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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A.,

Petitioner,

v.

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal district court has subject-matter jurisdiction to hear a claim under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and the parallel anti-fraud provision in the Securities Exchange Act of 1933, 15 U.S.C. § 77*l*(2), when the claim alleges fraud in the sale of securities by means of false representations made in telephone calls and facsimiles between an overseas seller and a foreign agent of the buyer who was residing in the United States at the time of the sale.

2. Whether the Securities and Exchange Commission's interpretation of its Regulation S, providing that the 1933 Act's securities registration requirements apply to solicitations to purchase securities made to a person in the United States by telephone from abroad, should have been applied by the Second Circuit under the heightened standard of deference applied by this Court in *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994).

LIST OF PARTIES

Petitioner, Europe and Overseas Commodity Traders, S.A., was the appellant below. Petitioner is a closely held corporation, the sole shareholder of which is Alan Carr, and has no publicly held corporate parents, subsidiaries or affiliates.

Respondents, Banque Paribas London, Paribas Global Bond Futures Fund, Paribas Asset Management Ltd. and John Arida, were appellees below.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-29a, *infra*) is reported at 147 F.3d 118 (2d Cir. 1998). The opinion of the district court (Pet. App. B, pp. 30a–54a, *infra*) is reported at 940 F. Supp. 528 (S.D.N.Y. 1996).

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1998. On August 13, 1998, Justice Ginsburg granted a timely application for an extension of time within which to petition for a writ of certiorari until November 2, 1998 (Pet. App. C, p. 54a, *infra*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 78aa states in relevant part: "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder."

15 U.S.C. § 78j [Section 10(b)] states in relevant part: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange–. . . (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 U.S.C. §77*l* [Section 12] states in relevant part: "In general. Any person who--(1) offers or sells a security in violation of section 5 . . . shall be liable to the person

purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

15 U.S.C. § 77e [Section 5] states in relevant part: "Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly--(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise . . ."

STATEMENT

1. Introduction

This case concerns the sale of unregistered securities to the petitioner by means of alleged false and fraudulent representations by the respondents. The representations were made to petitioner's only principal and shareholder, Alan Carr. Mr. Carr is a citizen of Canada, but the securities were sold to petitioner, acting through Mr. Carr, while he was staying at his winter home in Florida. The courts below dismissed petitioner's fraud claim because, in their view, Section 10(b) of the Securities Exchange Act of 1934 and Section 12 of the Securities and Exchange Act of 1933 do not protect foreign entities from fraudulent practices by foreign sellers or from the sale of unregistered securities, even if the foreign seller uses instrumentalities of interstate commerce to target a buyer in the United States. This position taken by the courts below conflicts with the view of

the Securities and Exchange Commission ("SEC") as set forth in the SEC's *amicus curiae* brief in the court of appeals.

The decision below sharpens an existing conflict among the circuits over the protection afforded by American securities laws to foreign citizens who purchase securities while they are present on American soil. Petitioner's complaint may have been insufficient to survive under the restrictive standard applied by the Second, Fifth and Seventh Circuits, but it would have stated a claim under the principles applied by the Third, Eighth and Ninth Circuits. The Second Circuit's decision also conflicts with principles articulated by this Court concerning the heightened deference that should be given to the SEC in the interpretation of its own rules and regulations.

2. The Facts

a. ***The parties.*** – Petitioner is a Panamanian corporation that engages in the investment of capital in securities and other ventures. Pet. App. 2a. Petitioner is wholly owned by Alan Carr, a Canadian citizen who periodically resides in Boca Raton, Florida, for substantial periods of the year. J.A. 173, ¶ 2.[1] Respondent Banque Paribas is a French investment bank that controls the other two corporate respondents, which are located in Luxembourg and the Bahamas respectively. Pet. App. 2a. John Arida, a national of the United Kingdom, was employed by Banque Paribas as an account manager during the transactions at issue in this case. *Id.*

b. ***Mr. Carr buys some of the Fund's stock.*** – In 1992, petitioner opened a trading account at Paribas. Pet. App. 5a. In

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[1] "J.A." refers to the Joint Appendix filed by the parties in the Court of Appeals for the Second Circuit.

early October 1993, Mr. Carr visited England and met with Mr. Arida, who informed Mr. Carr that he had an investment opportunity he wished to propose. *Id.* Mr. Arida wanted to interest Mr. Carr in the Paribas Asset Management Fund (the "Fund"). The parties dispute whether Mr. Carr placed the first order for purchase of Fund securities from London or Florida. Pet. App. 7a. The district court found, in weighing the disputed facts presented in party affidavits, that petitioner's first purchase of five shares (valued at approximately $142,000) occurred while Mr. Carr was in London. Pet. App. 8a.

c. ***Mr. Carr travels to Florida.*** – It is undisputed that Mr. Carr left England for his home in Florida on October 9, 1993. Pet. App. 33a. He resided in Florida during the remaining events alleged in the complaint. Pet. App. 33a, 37a. While Mr. Carr was in Florida, Arida contacted him by telephone and facsimile with information about the Fund. Pet. App. 5a-6a. Mr. Carr placed six orders for Fund securities over the ensuing six weeks, in an amount totaling approximately $1.6 million in addition to the $142,000 spent on the first sale. Pet. App. 6a; J.A. 238f.

d. ***Misrepresentations are made in Florida.*** – During these communications with Mr. Carr in Florida, respondents allegedly misrepresented how and by whom the Fund was managed and then specifically misstated the Fund's trading strategies. Respondents also concealed important information about the net asset valuation of the Fund. They led Mr. Carr to believe that the Fund had a greater valuation than it actually did. These misrepresentations and omissions were allegedly designed to, and in fact did, induce petitioner to make the six purchases of securities from Florida. The complaint alleges that the respondents continued to make affirmative misrepresentations and omissions about the investment, via facsimile, in materials provided after the sales to Mr. Carr, who was then in Florida. Respondents allegedly misrepresented the Net Asset Valuation

of the Fund and withheld documentation from Mr. Carr that would have revealed this material information.

e. ***Other misrepresentations made in Florida.*** – During this same period, the respondents solicited and sold securities to Mr. O'Brien, an acquaintance of Mr. Carr, who was living in Florida. Pet. App. 7a-8a.

f. Petitioner's loss. – Within seven months of petitioner's first purchase, the value of petitioner's investment in the Fund had dropped nearly $1 million. Pet. App. 36a. Petitioner proposed that his shares be repurchased for the price he had paid. The respondents refused the offer.

3. The Lawsuit

a. ***Petitioner files a complaint.*** – Petitioner filed suit in the United States District Court for the Southern District of New York, alleging five federal claims and several pendent state claims. The complaint alleged that respondents had violated Section 12 of the Securities Exchange Act of 1933 by selling unregistered securities in the United States without an exemption. 15 U.S.C. § 77*l*(1). The complaint also alleged that representations and omissions by the respondents in connection with the sales violated the anti-fraud provisions of both the Securities Act of 1933, 15 U.S.C. § 77*l*(2) and the Securities Exchange Act of 1934, 15 U.S.C. § 78j.

b. ***Petitioner's complaint is dismissed.*** – Respondents moved to dismiss the complaint on the ground that the district court lacked subject matter jurisdiction because petitioner could not show that the fraud claims occurred "in the United States," as measured by the "conduct" or "effect" test that the Second Circuit has applied to transnational securities transactions. The

district court dismissed the entire complaint because it concluded that the core of the sales transactions occurred abroad.

c. ***The SEC supports jurisdiction.*** – After the parties briefed the appeal to the Second Circuit, that court requested the views of the Securities and Exchange Commission. The SEC stated that, in its view, petitioner had stated a claim under the antifraud provisions of the Securities Acts and under the registration provisions of the 1933 Act and the Investment Company Act of 1940. The SEC's brief declared, "The Commission believes that the antifraud provisions of the securities laws are applicable when, as alleged here, misrepresentations are transmitted into the United States, directed to a person in the [sic] this country to induce him to buy securities." SEC Br. at 2.

With regard to the sale of unregistered securities, the SEC added, "The Securities Act registration provisions [and, by analogy, the Investment Company Act provisions] are applicable when, as alleged in this case, solicitations to purchase securities are made to a person in this country by telephone from abroad." *Id.* at 2-3. The SEC's conclusion rested on its interpretation of Regulation S, which states that the registration requirements apply to "offers and sales that occur within the United States." 17 C.F.R. § 230.901 (1993). The SEC pointed to earlier agency rulings that telephone calls made to the United States are "within the United States" within the meaning of Regulation S. SEC Br. at 20, citing 53 Fed. Reg. 22661, 22666; and that offers made to transient visitors while in the United States are not within the safe harbors, *id.* at 21, citing 55 Fed. Reg. at 18316 n. 115.

4. The Appellate Decision

The Second Circuit accepted as true petitioner's allegations that all solicitations and sales of the Fund securities were directed by the respondents to Mr. Carr while he was residing in Florida. Pet. App. 8a. It also acknowledged that "the most important piece of the alleged fraud – reliance on a misrepresentation – may have taken place in this country." Pet. App. 26a. And the court held that the anti-fraud provisions of the securities laws have a broader jurisdictional reach than the securities laws' registration requirements. Pet. App. 9a.

Nonetheless, the court of appeals found that the solicitation and sales to Mr. Carr while in Florida, even if fraudulent, were "outside the United States" both under Regulation S and the anti-fraud provisions. It took a narrow view of the "conduct" and "effect" tests that are typically applied to determine when a federal court has jurisdiction over claims of transnational securities fraud. The court concluded that the solicitations and sale to Mr. Carr in Florida did not "have the effect of creating a market for those securities in the United States," because Mr. Carr's presence in the United States was "entirely fortuitous and personal" and because petitioner, who was the actual purchaser, was an offshore corporation. Pet. App. 16a-17a.

The court also relied on the fact that no U.S. citizen, company or securities exchange was harmed by the alleged fraud. Pet. App. 21a. It held that "a series of calls to a transient foreign national in the United States is not enough to establish jurisdiction under the conduct test." Pet. App. 23a. Only if there had been some "additional factor" (*id.*) such as the involvement of an American investor or some economic activity in the United States could American law control.

REASONS FOR GRANTING THE WRIT

I

THERE IS A CONFLICT AMONG THE CIRCUITS OVER THE APPLICABILITY OF AMERICAN SECURITIES LAWS TO FRAUDULENT SALES BY FOREIGN SELLERS TO FOREIGN BUYERS WHO ARE TEMPORARILY RESIDENTS IN THE UNITED STATES

The Second Circuit refused in this case to permit an American court to hear a civil suit for violation of the anti-fraud provisions of the securities laws even though misrepresentations were allegedly made from outside the country to a person residing in the United States using facilities of interstate commerce. The Second Circuit said that "the law of this circuit" (Pet. App. 23a) did not recognize jurisdiction because, in the Second Circuit's view, "no relevant interest of the United States was implicated." *Id.* That restrictive reading of the reach of the securities laws may be consistent with rulings of the Fifth and Seventh Circuits. *See Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 906 (5th Cir. 1997); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659 (7th Cir. 1998). But it conflicts with the decisions of the Third, Eighth and Ninth Circuits. *See SEC v. Kasser*, 548 F.2d 109 (3d Cir. 1977); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983).

The difference among these Circuits has been recently summarized by the Seventh Circuit in its opinion in *Kauthar SDN BHD*, *supra*, and we quote the relevant passage describing that conflict (149 F. 3d at 16-18, footnotes omitted):

The predominant difference among the circuits, it appears, is the degree to which the American-based conduct must be related causally to the fraud and the resultant harm to justify the application of American securities law. At one end of the spectrum, the District of Columbia Circuit appears to require that the domestic conduct at issue must itself constitute a securities violation. *See Zoelsch*, 824 F.2d at 31 ("Jurisdiction will lie in American courts where the domestic conduct comprises all the elements of a defendant's conduct necessary to establish a violation of section 10(b) and Rule 10b-5."). At the other end of the spectrum, the Third, Eighth and Ninth Circuits, although also focusing on whether the United States-based conduct caused the plaintiffs' loss, to use the Fifth Circuit's words, "generally require some lesser quantum of conduct." *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997). In *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977), the Third Circuit stated that the conduct came within the scope of the statute if "at least some activity designed to further a fraudulent scheme occurs within this country." The Eighth Circuit, in *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979), held that the antifraud provisions were applicable when the domestic conduct "was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment." The Ninth Circuit adopted the Continental Grain approach in *Grunenthal*

GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983).

> Our colleagues in the Second and Fifth Circuits have set a course between the two extremes that we have just discussed. That approach requires a higher quantum of domestic conduct than do the Third, Eighth and Ninth Circuits. *See Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 905-06 (5th Cir. 1997). The Second Circuit has stated that foreign plaintiffs' suits under the antifraud provisions of the securities laws, such as Kauthar's, will be "heard only when substantial acts in furtherance of the fraud were committed within the United States." *Psimenos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041, 1045 (2d Cir. 1983). Furthermore, if the United States-based activities were merely preparatory in nature, or if the "'bulk of the activity was performed in foreign countries,'" jurisdiction will not exist. *Id.* at 1046 (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975)). In addition, only "where conduct 'within the United States directly caused' the loss will a district court have jurisdiction over suits by foreigners who have lost money through sales abroad." *Id.* (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018, 96 S.Ct 453, 46 L.Ed.2d 389 (1975); *see also Vencap*, 519 F.2d at 1018.

Although the court below did not canvass the conclusions of other circuits in its opinion, it is plain that it was applying standards that govern *only* in the Second Circuit

and are approved in the Fifth and Seventh Circuits. Indeed, apart from a singular ruling of the D.C. Circuit, no judicial authority is cited in the opinion below other than decisions of this Court and those of the Second Circuit.[2]

The federal courts of appeals have noted this conflict among the circuits. *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) ("The circuits are divided as to precisely what sort of activities are needed to satisfy the conduct test"); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30-31 (D.C. Cir. 1987) ("Several tests have been devised for determining when American courts have jurisdiction . . . . The Second Circuit has set the most restrictive standard. . . . The Third, Eighth and Ninth Circuits appear to have relaxed the Second Circuit's test.").

Scholars have also noted that the circuits are in conflict over the issue. *See Chai & Guzman, "The Dangerous Extraterritoriality of American Securities Law,"* 17 NW J. Int'l L. & Bus. 207, 217 (1996) ("The Second Circuit test . . . was later adopted by the D.C. Circuit . . . . Other circuits, including the Third, Eighth and Ninth, however, have adopted a broader standard for the assertion of jurisdiction. They have held that jurisdiction exists 'where at least some activity designed to further a fraudulent scheme occurs within this country.'");

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[2] The Second Circuit represents that the D.C. Circuit in *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987), adopts the Second Circuit test. The D.C. Circuit did not, we believe, adopt the Second Circuit's test, but applied its own. Petitioner in this case may well have prevailed had the *Zoelsch* standard been applied. *Zoelsch*, 824 F.2d at 33 n. 4 ("[T]he test we adopt here *does* provide jurisdiction whenever any individual is defrauded in this country . . . for the actual consummation of securities fraud in the United States in and of itself would constitute domestic conduct that satisfies all the elements of liability.") (emphasis added).

Gordon, *"United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation,"* 10 Fla. J. Int'l L. 487, 522 (1996) ("Subsequent decisions in other circuits have identified *Kasser* as a departure from the Second Circuit, which was followed later by the Eighth and Ninth Circuits."); Finnerty, *"The 'Mother Court' and the Foreign Plaintiff: Does Rule 10B-5 Reach Far Enough?,"* 61 Fordham L. Rev. S287, S301 (1993) ("Despite their formal adherence to the Second Circuit's analysis, however, several of these courts [the Third, Eighth, Ninth and District of Columbia Circuits] require a relatively low degree of conduct within the United States in connection with the sale or purchase of securities before exercising subject matter jurisdiction over a foreign plaintiff's Rule 10b-5 claim.").

Indeed, the respondents themselves recognized the split among the Circuits in the brief they filed below. They said:

> For over 20 years, [the Second Circuit] has applied a reasonableness standard in evaluating claimed international violations of the securities laws' antifraud provisions under the conduct test. Specifically, this Circuit has found subject matter jurisdiction over sales of securities to foreigners outside the United States only where (i) conduct in the United States was substantial and not "merely preparatory" or "ancillary" to the fraud alleged, *and* (ii) the acts within the United States "directly caused [the] losses that are the subject of the complaint." . . . The District of Columbia and Fifth Circuits have expressly adopted this Court's view of the conduct test.
>
> . . .
>
> Other Circuits, disagreeing with this Court, have adopted a version of the conduct test that

> is more permissive (although not so permissive as the SEC's). In contrast to this Court's requirement that substantial acts in furtherance of the fraud occur in the United States and directly cause the plaintiff's losses, the Third, Eighth and Ninth Circuits permit the assertion of subject matter jurisdiction under the conduct test if only "*some* activity" designed to further a fraudulent scheme occurs within the United States.

Defendants-Appellees' Brief in Response to Brief of the SEC, pp. 9-10 (citations omitted).

Had the plaintiff's claim been filed in a federal court in Philadelphia or in Los Angeles rather than in New York, the result of the defendants' motion to dismiss would have been different. If this split among the circuits is permitted to continue, foreign residents will be encouraged to shop for a favorable federal forum, and the consequences will be strikingly disparate results in similar cases involving sales calls or meetings in the United States with foreign residents who are temporarily here.

The position urged by the SEC before the court of appeals should be the universal rule, applicable regardless of where the lawsuit is initiated:

> We believe that the antifraud provisions of the securities laws should be applicable when, as alleged in this case, misrepresentations are directed to person in the United States to induce him to buy securities. This is particularly so here, since Carr lived in the United States for a significant

> period of time, and apparently did so each year.

Brief of the Securities and Exchange Commission, *Amicus Curiae*, pp. 17-18.

The SEC noted, in its brief, the compelling policies supporting this result. If the antifraud provisions of federal securities law were denied to foreign nationals temporarily in this country, it would create a category of potential fraud victims who expect to be protected by our laws but, in fact, are not. Moreover, concerns of reciprocity justify extending the protection of our laws to foreign nationals temporarily in the United States so that Americans located abroad will be similarly protected by foreign laws.

This Court should clear the confusion in order to provide greater certainty in the application of the securities laws to increasingly frequent transnational securities transactions of the sort in this case. This Court has, in the past, granted certiorari to address similar conflicts as to the extraterritorial application of Title VII of the Civil Rights Act (*EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991)), the Federal Employers' Liability Act (*New York Central R. Co. v. Chisholm*, 268 U.S. 29 (1985)), the National Labor Relations Act (*McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)), and the Lanham Act (*Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952)). The securities acts serve important federal interests, and the scope of their application presents at least as important a question as those resolved by the Court in the above cases.

II

IN REJECTING THE SEC'S INTERPRETATION OF ITS REGULATION, THE SECOND CIRCUIT VIOLATED THIS COURT'S ARTICULATED PRINCIPLES REGARDING DEFERENCE TO BE GIVEN TO AN AGENCY'S INTERPRETATION OF ITS OWN REGULATION

In addition to the claims based on fraud, petitioner alleged that respondents had solicited and sold in the United States unregistered securities in violation of Sections 5 and 12 of the 1933 Act. The Second Circuit correctly looked to Regulation S, which is a regulation adopted by the Securities and Exchange Commission interpreting when a security must be registered pursuant to Section 5. The court then ignored the SEC's own interpretation of Regulation S, as set forth in its *amicus curiae* brief. That holding was inconsistent with this Court's jurisprudence regarding the level of deference to be afforded to an agency's interpretation of its own published regulation.

The Second Circuit acknowledged that "the SEC has provided some guidance as to the applicability of registration requirement [sic] of the 1933 Act to foreign transactions," Pet. App. 10a, and it then stated, "We, of course, honor an agency's reasonable interpretation of a statute that Congress has entrusted the agency to administer." *Id.* at n. 3. The Court stated, however, that since it "uncovered no case or decision of the SEC construing § 230.901 [Regulation S] with respect to transients visiting the United States," it would craft its own interpretation of Regulations "on an essentially blank slate." Pet. App. 14a.

The SEC had formally told the court below, however, that "an offer 'would not be deemed to be outside the United States if made to a person inside the United States,'" SEC Br. at 20, and that "the transactions in this case are covered by the registration provisions of the Securities Act." *Id.* at 19.

The Second Circuit's refusal to defer to the SEC's interpretation of its own regulation conflicts with several decisions of this Court. In *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), the Court held that an agency's interpretation of its own regulation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 512. The agency's interpretation may be provided in an *amicus curiae* brief, as was done in *Auer v. Robbins*, 519 U.S. 452 (1997).

The question presented on the Section 12 claim is whether the SEC or the federal courts of appeals have the authority to define, in the first instance, the meaning of regulations promulgated by the SEC after notice and comment. That is a significant legal issue that implicates important federal law enforcement interests.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A
147 F.3d 118

Europe and Overseas Commodity Traders, S.A., Plaintiff-Appellant,

v.

Banque Paribas London, Paribas Global Bond Futures Fund, Paribas Asset Management Ltd. and John Arida, Defendants-Appellees.

Docket No. 96-7900

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

June 4, 1998, Decided

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Before WINTER, Chief Judge, OAKES and CABRANES, Circuit Judges.

OAKES , Circuit Judge

Europe and Overseas Commodity Traders, S.A. ("EOC"), a Panamanian corporation, appeals from a final judgment dismissing EOC's complaint pursuant to a Memorandum-Decision of the United States District Court for the Southern District of New York, Barbara S. Jones, Judge, dated June 19, 1996, as amended June 28, 1996. *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 940 F. Supp. 528, 530 n.1 (S.D.N.Y. 1996).* EOC's sole business is the investment of its capital in securities and other ventures. It is wholly owned by Alan Carr, a citizen of Canada. Defendant-Appellees are Banque Paribas ("Paribas"), Paribas Global Bond Futures Fund, S.A. (the "Fund"), Paribas Asset Management Ltd. ("PAM"), and John Arida, a U.K. national who works as an account manager in the London, England, office of Paribas. Paribas is a French bank; the Fund is organized under the laws of Luxembourg; and PAM is a Bahamian corporation which manages the Fund.

The transaction underlying this dispute is entirely foreign inasmuch as there is no U.S. party, but not, strictly speaking, wholly extraterritorial in that EOC alleges that an offer to sell foreign securities was made over the telephone and facsimile to its sole shareholder and agent, Alan Carr, who was in Florida, and both parties agree that orders to purchase securities were placed from Florida. We therefore address the question whether phone calls and facsimiles to a person on U.S. soil provide enough of a connection to the United States to implicate the registration and fraud provisions of U.S. securities laws, and give us jurisdiction thereunder.

EOC's complaint, filed on October 14, 1994, asserts eleven claims. Five are based on federal securities law including the sale of unregistered securities pursuant to Section 12 of the 1933 Act, 15 U.S.C. § 77*l*(1); sale of securities of an unregistered investment company pursuant to the Investment Company Act of 1940, 15 U.S.C. § 80a-7 et seq.; false and misleading statements pursuant to Section 12 of the 1933 Act, 15 U.S.C. § 77*l*(2); deceptive practices pursuant to Section 10b of the 1934 Act, 15 U.S.C. § 78j and Rule 10b-5, 17 C.F.R. § 240.10b-5; and control person liability pursuant to 15 U.S.C. § 78t. The remaining claims are based on Florida Blue Sky laws and Florida common law.

Defendants, in April of 1995 and prior to any discovery, moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction over three of the defendants, and forum non conveniens. Although defendants sought permission from the district court also to move for dismissal on the grounds of failure to state a cause of action, the district court ordered the defendants to address only the jurisdictional and forum non conveniens issues. See Order dated March 14, 1995, 94 Civ. 7471 (Batts, Deborah A., Judge). Paribas submitted declarations from Arida; John Baker, the Compliance Officer of the London branch of Paribas; Pierre Corbiau, Secretary of the Fund; Denis Coulon, Director of PAM; and Andrew Charles Smith, a member of the Bar of England and Wales experienced in the commercial and business law of England. The bank also offered a copy of its Investment Agreement with EOC. EOC submitted a declaration of Carr. After a hearing, the district court requested additional information on factual issues pertinent to the jurisdictional questions. EOC submitted a second Carr declaration, which contradicted in significant respects defendants' factual allegations, and defendants submitted further statements from Baker. Judge Jones issued her decision of dismissal on June 19, 1996. EOC filed notice of

appeal on July 19, 1996. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. On July 11, 1997, following oral argument in this case, we invited the Securities and Exchange Commission ("SEC") to submit an amicus curiae brief, which it did on October 9, 1997.

I.

Facts

The facts of this case, though disputed, are sparse. We nevertheless attempt to sketch them in sufficient detail to provide background for the opinion that follows. In so doing, we state the allegations of the complaint, but also indicate some of the points which the defendants strongly dispute.[1]

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[1] The district court correctly relied on material outside of the complaint in ruling on the Rule 12(b)(1) motion as it would in considering a motion for summary judgment. *Europe and Overseas*, 940 F. Supp. at 530 n.2 (citing *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986) ("Rule 56 is relevant to the jurisdictional challenge in that a body of decisions under Rule 56 offers guidelines in considering evidence submitted outside the pleadings.")). As Justice Scalia noted in his separate opinion in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 68, 108 S. Ct. 376, 387, 98 L. Ed. 2d 306 (1987) (Scalia, J., concurring in part and concurring in the judgment), "it is well ingrained in the law that subject-matter jurisdiction can be called into question either by challenging the sufficiency of the allegation or by challenging the accuracy of the jurisdictional facts alleged." (citing inter alia *Land v. Dollar*, 330 U.S. 731, 735 n.4, 67 S. Ct. 1009, 1011 n.4, 91 L. Ed. 1209 (1947)). See also *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (1997) (court may refer to any material in the record to establish its subject matter jurisdiction). However, as this court recently cautioned in *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 125 (2d Cir. 1995), "a plaintiff . . . should not be deprived of its day in an American court by a Rule 12(b)(1) order based on erroneous facts . . . ." In a close case, the factual basis for a court's subject matter jurisdiction may remain an issue through trial, and, if and when doubts are resolved

EOC's account at Paribas was established in London in 1992. The "Non-discretionary Investment Agreement" between EOC and Paribas was executed on October 22, 1992, by EOC directors Ian F. Leger and Herbert W. Marvelly. In this agreement, EOC gave a corporate registration address in Panama and a mailing address in Monaco. The company also represented that its directors' meetings take place in Monaco, and named an agent for service of process in England.

In October of 1993, Carr was visiting England, as he often does in the autumn. Arida, on October 7, there informed him that a substantial amount of cash had accumulated in EOC's account, and offered to recommend an attractive investment opportunity for the money. Carr says he expressed interest in the proposal, but explained to Arida that he was preparing to leave for Florida on the 9th and that he would be happy to hear more after his arrival.

In a series of telephone conversations which began on October 14, Carr and Arida resumed their discussion of EOC's investment in the Fund as planned after Carr's arrival in Florida. The parties agree that each party initiated at least some of these calls. Carr claims that these conversations with Arida were their first significant discussion of the Fund. Carr also alleges that Arida misled him by conveying the following facts, which EOC now claims are not accurate: (a) the Fund was overseen by Paribas's proprietary trading desk; (b) the investors' capital in the Fund was traded along with Paribas's own capital; and (c) the Fund traded securities based primarily on technical as opposed to fundamental

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against jurisdiction, warrant dismissal at that time. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1330 (2d Cir. 1972).

considerations. In reliance on these statements, Carr says that from Florida he ordered EOC's first purchase of shares of the Fund on October 18, 1993. He also alleges that these representations were repeated on the occasion of each of his subsequent six purchases which, together with the October 18 purchase, totaled some $1,800,000. Carr further alleges that the defendants at the time of his initial purchase agreed to provide him with weekly statements of the Fund's net asset value, but concealed from him the true net asset value of the Fund during the period of his later purchases.

Arida disputes this version of the events. He claims that his first significant conversation with Carr about the Fund occurred while Carr was still in England. He also asserts that Carr ordered the first purchase of Fund shares from England. In support of Arida's story, Paribas offers a copy of a facsimile transmission, dated October 8, from its London office to the Fund in Luxembourg placing an order for five shares. This transmission, which does not list a purchase price, also does not name Carr or EOC as the party for whom the transaction was made. It does, however, list an account number. Unfortunately, the record does not demonstrate whether the number identifies EOC.

EOC counters with a letter sent to Carr by Arida listing October 18 as the day of the first purchase of Fund shares and the number purchased as ten. Paribas explains that the October 8 order for five shares was combined with a second order for five shares, which was placed on October 14, to make the ten shares described in Arida's letter. The bank further explains that a transaction ordered on the 8th would have been valued, or priced, on the 18th, because of Fund Rules. The net asset value per share of the Fund is determined weekly on each Monday that is a bank business day in Luxembourg. Shares of the Fund may only be purchased on such days. Applications to purchase shares must be received in Luxembourg not later than 1:00 p.m. on

the second business day preceding a valuation day (presumably most often a Thursday as here). October 8, 1993, being a Friday, any application received on that day would not have been valued on the following Monday, October 11, but would have been required to wait until the next Monday, which was the 18th. Thus, Fund rules require that orders placed on the 8th and the 14th would both be finalized on October 18.

Carr, in turn, says that Paribas promised him that these rules would not apply to EOC, because of the large size of its transactions. He also avers that Arida may have misunderstood their preliminary discussion as authorization to buy, or impetuously placed the initial order before Carr had consented to the purchase. Such is the disagreement concerning the date and place of the first purchase. Both parties agree, however, that at least six buy orders were placed by Carr on behalf of EOC from his vacation home in Florida.

Sale to O'Brien.

Shortly after EOC's first purchase, Carr says he told a Florida acquaintance, Matthew O'Brien, about the Fund, and passed along to him Arida's description of the Fund. There is no statement in the record from O'Brien, so the following facts are drawn from Carr's affidavit. O'Brien, in October of 1993, was a legal alien residing in a house he owned in Florida. He has since become a U.S. citizen. He contacted Paribas on Carr's advice, and, after hearing the same alleged misrepresentations as Carr, invested at least $100,000 in the Fund. Like EOC, O'Brien sustained substantial losses.

O'Brien's "Application Form," which is dated October 19, 1993, for the purchase of 3 shares valued at U.S. $87,000, is included in the record. O'Brien there represents his nationality as British, and gives a London address and

telephone number. A typed note at the bottom of the form explains "I am presently visiting the United States on business" and lists a mailing address and phone number in Florida. We discuss the significance of O'Brien at the end of the opinion, because the allegations concerning him have little impact on our jurisdiction over EOC's federal claims.

District Court Findings.

The district court found that O'Brien resided in England at the time of his purchase, that plaintiff EOC's principal place of business was in Monaco, and that the initial purchase of Fund shares occurred on October 8, 1993, a date when both parties agree Carr was still in England. *Europe and Overseas,* 940 F. Supp. at 532. The court also relied on the sworn statement of Corbiau, Secretary of the Fund, *id.* at 533, that "insofar as I am aware, no investor in the Fund is a U.S. citizen or resident." But, because no discovery was conducted, this statement was not confirmed by independent findings.

We do not think that the district court needed to conclude, contrary to plaintiff's assertions, that O'Brien resided in England or that the plaintiff's principal place of business was in Monaco. We think that it could have based its holding only on findings that EOC and O'Brien made such representations to Paribas, and, thus, Paribas reasonably trusted that at all times during these transactions the bank was dealing with an English individual and a Panamanian corporation with offices in Monaco.

For reasons discussed next, even accepting as true EOC's allegations that the initial offer to sell Fund shares occurred while Carr was in Florida, the transactions between EOC and Paribas did not implicate the prescriptive jurisdiction of the federal securities laws.

II.

Discussion

Appellant EOC emphasizes in its briefs to this court that the district court did not discuss the claims at the heart of this case: sale of unregistered securities of an unregistered investment company to an individual on U.S. soil in violation of §§ 5 and 12 of the Securities Act of 1933[2] and of the Investment Company Act of 1940. EOC seeks rescission of its purchase and reimbursement of the money it invested in the Fund.

A. Registration under the 1933 Act.

EOC claims that the same "conduct and effects test," which this circuit applies to determine the extraterritorial scope of the fraud provisions of the federal securities laws, should be applied to determine the appropriate reach of the federal registration requirements. The relevant "conduct," EOC maintains, was the solicitation and sale of unregistered securities in the United States, and the relevant "effect" was the consummation of the sale of unregistered securities to a person within the United States. In other words, EOC appears to argue that any solicitation of unregistered securities within the territory of the United States is within the scope of the registration laws, and thus forbidden, without regard to the identity or nationality of any party.

The decided law of this circuit clearly states that the antifraud provisions may reach certain transactions not within the registration requirements of our securities law.

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[2] Section 12 of the 1933 Act, 15 U.S.C. § 77*l*, creates civil liability for any person who offers or sells a security in violation of § 5 of the Act, 15 U.S.C. § 77e.

Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262 (2d Cir. 1989) ("As we observed in Bersch . . . the antifraud provisions of American securities laws have broader extraterritorial reach than American filing requirements.") (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir. 1975)); see also *Bersch*, 519 F.2d at 986 ("It is elementary that the anti-fraud provisions of the federal securities laws apply to many transactions which are neither within the registration requirements nor on organized American markets.") (citing Leasco, supra, note 1, 468 F.2d at 1335-37). We therefore reject EOC's assertion that the "same standard" applies to the antifraud and registration laws, if EOC means that the registration and fraud provisions are coextensive. The analysis of jurisdiction to prescribe rules governing foreign transactions is guided by "the nature and source of the claim asserted." See *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 n.4 (D.C. Cir. 1987) (comparing the role of the underlying claim in subject matter jurisdiction analysis to that in other "threshold issues" such as standing).

In contrast to the antifraud provisions of the 1934 Act, the SEC has provided some guidance as to the applicability of registration requirement of the 1933 Act to foreign transactions.[3] We turn first to this regulation.[4]

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[3] We, of course, honor an agency's reasonable interpretation of a statute that Congress has entrusted the agency to administer. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S. Ct. 2778, 2781-83, 81 L. Ed. 2d 694 (1984); see also Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1 (1983) (legitimizing judicial deference to agency constructions of federal statutes in light of the doctrine of the separation of powers) ("[A court] would be violating legislative supremacy by failing to defer to the interpretation of an agency to the extent that the agency had been delegated law-making authority." *Id.* at 28.).

However, we acknowledge that our precedent determining the extraterritorial reach of related provisions of the U.S. securities laws may provide some assistance in filling any gaps in the SEC's treatment of the scope of the registration provisions.

Under Regulation S, which was issued by the SEC and became effective on May 2, 1990, there are two ways that a sale of securities could fall outside § 5's registration requirement. First, a transaction could be "outside the United States," and, second, it could fall into either one of two exceptions defined by the SEC. As the SEC explained in the

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[4] Although our analysis below is attentive to specific SEC regulations, it is nonetheless distinct from consideration of the merits. In this motion to dismiss for lack of subject matter jurisdiction, the only issue is whether the registration requirement of § 5 conceivably applied with respect to the parties who are resisting its application. If it does not, the parties' conduct was outside the prescriptive jurisdiction of the United States. See *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946) ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.") We therefore address only the application of the requirement to this conduct and not any defenses or other issues that might be relevant to the merits.

Section 5 prohibits any person from offering or selling a security in interstate commerce unless it is registered. "The elements of [an] action for violation of Section 5 are (1) lack of a registration statement as to the subject securities; (2) the offer or sale of the securities; and (3) the use of interstate transportation or communication and the mails in connection with the offer or sale." *In re Command Credit Corp.*, 1995 SEC LEXIS 989, 1995 WL 279776, *2 (S.E.C. Apr. 19, 1995). Section 12 provides a rescissionary remedy to persons who purchase unregistered securities in violation of § 5. The terms "offer" and "sell" were construed broadly by the Court in *Pinter v. Dahl*, 486 U.S. 622, 644-47, 108 S. Ct. 2063, 2077-78, 100 L. Ed. 2d 658 (1988), to reach agents for sellers, such as Paribas, though agents for buyers were not discussed.

statement accompanying the new rule, Regulation S adopts a "territorial approach" to § 5.[5] Offshore Offers and Sales, Securities Act Release No. 33-6863, 55 Fed. Reg. 18306, 18307 (May 2, 1990). It does so by setting out a general rule that offers, offers to sell, and sales of securities made outside the United States are not subject to the registration requirement of § 5, while those within the United States must be registered. 17 C.F.R. § 230.901 (1996). The two so-called "safe harbor" exemptions permit the issuance and resale of securities under certain specified conditions. Offerings and resales meeting these conditions are deemed to take place outside the United States for the purpose of § 5. See 17 C.F.R. §§ 230.903 (issuers), 230.904 (resellers).

We first examine the safe harbors to determine if either one clearly applies to this transaction. The issuer safe harbor appears to be the only exemption plausibly available to the Fund. Paribas, acting as an agent for the Fund, distributed shares to the public, bringing the bank within the definition of an issuer. See 17 C.F.R. § 230.903. Two general conditions, however, must be met for either of the safe harbors to apply: first, no "directed selling efforts" may be made in the United States. The release defines "directed selling efforts" as marketing efforts such as mailings or seminars in the United States designed to induce the purchase of securities

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[5] The SEC statement explains: "Rule 901(a) is a general statement of the applicability of the registration provisions of the Securities Act. The General Statement provides that any offer, offer to sell, sale, or offer to buy that occurs within the United States is subject to section 5 of the Securities Act, while any such offer or sale that occurs outside the United States is not subject to section 5. The determination as to whether a transaction is outside the United States will be based on the facts and circumstances of each case. . . . For a transaction to qualify under the General Statement, both the sale and the offer pursuant to which it was made must be outside the United States." SEC Release No. 33-6863, 55 Fed. Reg. at 18309 (footnote omitted).

purportedly being distributed abroad. SEC Release No. 33-6863, 55 Fed. Reg. at 18311. Second, any offer or sale must fit the definition of an "offshore transaction," which requires inter alia that no offer be made to a person in the United States.[6]

Given the facts alleged by EOC in this case, we cannot say that the Fund can clearly rely on the issuer safe harbor. EOC says that Arida's representations made over the telephone and facsimile to Carr in Florida resulted in his entering a purchase order on behalf of EOC. This alleged conduct could qualify as either "directed selling efforts" or a forbidden offer to a person in the United States. For example, the SEC explained in its release, "offers and sales to transients in the United States are transactions in the United States and may not be part of an offering relying on the safe harbors of Regulation S." SEC Release No. 33-6863, 55 Fed. Reg. at 18316 n.115. Although Carr was merely an agent acting on behalf of an offshore corporation with its accounts offshore, we cannot say definitively on a Rule 12 motion that such an agent can never qualify as a "person in the U.S." for the purposes of the safe harbors.

A transaction not within either of the safe harbors may still be outside of the United States within the meaning of 17 C.F.R. § 230.901. We believe the purchases by EOC ordered by Carr were such foreign transactions. Proposed versions of Regulation S included a list of factors to be considered in determining whether an offer or sale occurs outside of the United States, but in response to comments on the proposals, the list was deleted in the final version.[7] SEC

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[6] The terms "directed selling efforts" and "offshore transaction" are defined with more detail respectively at 17 C.F.R. § 230.902 (b) and (i).

[7] The deleted factors were "the locus of the offer or sale, the absence of directed selling efforts in the United States, the likelihood of the

Release No. 33-6863, 55 Fed. Reg. at 18309. The SEC explained that "the determination as to whether a transaction is outside the United States will be based on the facts and circumstances of each case." Id. Our research has uncovered no case or decision of the SEC construing § 230.901 with respect to transients visiting the United States, so we work on an essentially blank slate.

We believe that the conduct and effects test used to determine the reach of the anti-fraud provisions of U.S. securities laws can be adapted to analyze what is outside the specific safe harbors yet still "outside the United States" under Regulation S. The conduct and effects test was developed by the courts in the absence of clear Congressional guidance as to the jurisdictional reach of the antifraud provisions of the securities laws. See *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991). To discern "whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to" such transactions, *Bersch*, 519 F.2d at 985, courts have looked to the underlying purpose of the anti-fraud provisions as a guide. See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.) (finding that extraterritorial application of the 1934 Act was appropriate where necessary to protect American investors), modified on other grounds, 405 F.2d 215 (1968) (en banc). The antifraud provisions are designed to remedy deceptive and manipulative conduct with the potential to harm the public interest or the interests of investors. See H.R. Rep. No. 1838, at 32-33 (1934),

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securities sold coming to rest outside the United States, and the justified expectations of the parties to the transaction as to the applicability of the registration requirements of the U.S. securities laws." Offshore Offers and Sales, Securities Act Release No. 33-6779, 53 Fed. Reg. 22661, 22661-2 (proposed June 17, 1988).

reprinted in 1 Alan R. Bromberg & Lewis D. Lowenfels, Bromberg and Lowenfels on Securities Fraud & Commodities Fraud § 2.2(331) (2d ed. 1997). In outlining the extraterritorial reach of these provisions, courts have reasoned that Congress would not want the United States to become a base for fraudulent activity harming foreign investors, or "conduct," see *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983), and that Congress would want to redress harms perpetrated abroad which have a substantial impact on investors or markets within the United States, or "effects." See *Schoenbaum*, 405 F.2d at 206; *Consolidated Gold Fields*, 871 F.2d at 261-62. However, because it is well-settled in this Circuit that "the anti-fraud provisions of American securities laws have broader extraterritorial reach than American filing requirements," *id.* at 262, the extent of conduct or effect in the United States needed to invoke U.S. jurisdiction over a claimed violation of the registration provisions must be greater than that which would trigger U.S. jurisdiction over a claim of fraud. To adapt the conduct and effects test for use in interpreting the registration provisions, we must take into account Congress's distinct purpose in drafting the registration laws.

Congress passed the registration provisions "to assure full and fair disclosure in connection with the public distribution of securities." James D. Cox et al., Securities Regulation 45 (1991). Through mandatory disclosure, Congress sought to promote informed investing and to deter the kind of fraudulent salesmanship that was believed to have led to the market collapse of 1929. Id. at 14 (citing H.R. Rep. No. 85 (1933)). The registration provisions are thus prophylactic in nature. Seen in this light, the registration provisions also can be said to aim at certain conduct with the potential for discernible effects. Specifically, the registration provisions are designed to prevent the offer of securities in the United States securities market without accompanying standardized disclosures to aid investors, a course of conduct.

This conduct, in turn, has the effect of creating interest in and demand for unregistered securities. To avoid this result, in keeping with Congress's purpose, the registration provisions should apply to those offers of unregistered securities that tend to have the effect of creating a market for unregistered securities in the United States; and by "creating a market" we do not mean to imply that the conduct must be directed at a large number of people.

The Commissioner's release accompanying Regulation S, as well as the early version of Regulation S, support the application of this conduct and effects test. The factors originally listed in Regulation S pertaining to when an offer or sale of a security occurs outside the United States largely pertain to efforts to create a market in the United States for unregistered foreign securities. These factors were "the locus of the offer or sale, the absence of directed selling efforts in the United States, and the justified expectation of the parties to the transaction as to the applicability of the registration requirements of the U.S. securities laws." Offshore Offers and Sales, Securities Act Release No. 33-6779, 53 Fed. Reg. 22661, 22661-2 (proposed June 17, 1988). Such a test is also consistent with earlier statements by the SEC about the scope of the registration provisions. See, e.g., SEC Release No. 33-6863, 55 Fed. Reg. at 18308 ("The Commission, however, historically has recognized that registration of offerings with only incidental jurisdictional contacts should not be required."); see also *Registration of Foreign Offerings by Domestic Issuers*, 1964 SEC LEXIS 95, Securities Act Release No. 33-4708, 1964 WL 3661 (July 9, 1964) (stating that U.S. corporations could safely distribute unregistered securities abroad to foreign nationals, if distribution were effected in a manner that would result in the securities coming to rest abroad); *Vizcaya Int'l N.V., SEC No-Action Letter*, 1973 WL 11880, at *4 (Apr. 4, 1973) (extending the position of Release No. 33-4708 to foreign corporations).

The nearly de minimis U.S. interest in the transactions presented in the instant case precludes our finding that U.S. jurisdiction exists under the more limited conduct and effect standard appropriate under the registration provisions of the 1933 Act. Under the facts as alleged by EOC, there was conduct in the United States because Arida called Carr here and Carr executed his order here. However, the conduct was not such as to have the effect of creating a market for those securities in the United States. Carr's presence here was entirely fortuitous and personal, and the actual purchaser of shares in the Fund was an offshore corporation without a place of business here.[8] Although the offer or sale of an unregistered security to an agent of a foreign company in the United States may in some cases tend to create a market for the security in the United States, this is not such a case. EOC was conducting no business in the United States through Carr, nor otherwise benefitting from his presence here. Nor did the transaction involve a U.S. broker or other U.S. financial entity. Arida, on his part, did nothing to encourage a market for securities in the United States. He made no calls or solicitations to individuals he had reason to suspect were American citizens or permanent residents in the United States, and he directed no general sales efforts here. Accordingly, we hold that the securities sold to EOC did not fall under the registration requirements of the 1933 Act, and that we therefore lack subject matter jurisdiction over EOC's § 5 claims.

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[8] While my colleagues do not agree, the author of this opinion would add that:

> Having chosen to do business through an offshore corporation to avoid taxes and other regulatory burdens, Carr cannot now claim to be an alter ego of EOC. See *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) ("We will not 'pierce the corporate veil' in favor of those who created it.").

Of course, we do not attempt in ruling on this case to provide a set of definitive rules to govern future transactions. Nor do we mean to suggest that standards developed under the anti-fraud provisions may be incorporated wholesale into the registration context. The exact contours of the conduct and effects test, as applied to registration cases, must remain to be defined on a case-by-case basis.

B. Investment Company Act of 1940.

The SEC has clearly said that compliance with Regulation S does not excuse non-compliance with the Investment Company Act of 1940.[9] See SEC Release 33-6863, 55 Fed. Reg. at 18316 n.108. Section 7(d), which governs the Investment Company Act's application to foreign companies, prohibits any investment company which is not organized under the laws of the United States or of a State to use the means of interstate commerce to offer for sale or sell "in connection with a public offering" any security of which it is the issuer. 15 U.S.C. § 80a-7(d). Section 7(d) by its terms only prohibits public offerings by foreign investment companies (absent receipt of an order from the Securities and Exchange Commission). EOC has not alleged that Fund shares were sold by Paribas in connection with a public offering in the United States, and there is no evidence to support such a claim. There is no evidence of a general solicitation in the United States or that offers were made to persons who were not wealthy, sophisticated investors. See, e.g., *Ackerberg v. Johnson*, 892 F.2d 1328, 1337 (8th Cir. 1989). The defendants were, thus, not subject to the Investment Company Act.

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[9] EOC does not address the issue whether there is a private right of action to enforce § 7(d). We assume for the purpose of this appeal, though we by no means hold, that one exists.

C. Antifraud Provisions.

As discussed above, the antifraud provisions of the securities laws have been held to reach beyond the registration requirement of the 1933 Act. Our conclusion with respect to registration does not therefore eliminate the possibility that jurisdiction could be found under § 10(b) of the 1934 Act (codified at 15 U.S.C. § 78j) and Rule 10b-5 (17 C.F.R. § 240.10b-5).[10] Congress's power to impose civil penalties for fraud in predominately foreign securities transactions is limited only by the Due Process Clause of the Fifth Amendment. In a long line of decisions stretching back to Schoenbaum, this circuit has recognized that the federal securities laws do not reach this constitutional limit.[11] We have looked for conduct, see, e.g., *Leasco*, 468 F.2d at 133-34; effects, see, e.g., *Schoenbaum*, 405 F.2d at 206-09; or a combination thereof, see, e.g., *Itoba*, supra, note 1, 54 F.3d at 122, in the United States to arrive at "our best judgment as

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[10] The complaint also alleged a violation of the fraud provision of § 12 of the 1933 Act (15 U.S.C. § 77*l*(2)). Appellant's brief to this court does not advance this provision as a basis for our assertion of jurisdiction apart from § 10(b), or cite us to any case considering § 12 as a distinct basis for asserting jurisdiction over a foreign transaction. Accordingly, we do not address the question, beyond concluding that § 12 does not reach further than § 10(b). As we noted in *Securities and Exch. Comm'n v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 855 n.22 (1968), the two antifraud provisions share similar language.

[11] The 1934 Act states at § 30(b) that it "shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter." 15 U.S.C. § 78dd(b). But, the SEC has provided no such guidance for the antifraud provisions of the 1934 Act, leaving the courts to decide the application of § 10(b) with reference to the statute and its purpose and history.

to what Congress would have wished if these problems [of extraterritorial application] had occurred to it." *Bersch*, 519 F.2d at 993 (footnote omitted).

Perhaps the most difficult cases under the conduct test have concerned activity in the United States that causes, or plays a substantial part in causing, harm to foreign interests overseas. By contrast, as stated above, the effects test concerns the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges.[12] See *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 9-10 (2d Cir. 1979); *Itoba*, 54 F.3d at 124. Telephone calls and facsimile transmissions conveying offers to sell securities and

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[12] As formulated in Bersch, the effects test concerns sales to "Americans resident in the United States." 519 F.2d at 993. We agree with the opinion expressed by Judge Motley in *O'Driscoll v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1983 U.S. Dist. LEXIS 13984, 1983 WL 1360, *3 (S.D.N.Y. Sept. 8, 1983) that "the United States would have a greater interest in protecting foreigners residing within its borders than foreigners resident abroad" and that, for this reason, U.S. residence of individual investors -- not American nationality -- must be the focus of the effects test. See Restatement of Foreign Relations § 416 (1)(a)(ii) (1987) ("The United States may generally exercise jurisdiction . . . with respect to . . . any offer to enter into a securities transaction, made in the United States by or to a national or resident of the United States.") Indeed, as Judge Motley noted, *O'Driscoll*, 1983 U.S. Dist. LEXIS 13984, 1983 WL at *4, since alienage is a protected class under the Constitution, *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971), limiting the effects test to citizen investors would be constitutionally suspect. Plaintiff EOC is, however, a foreign corporation, and even Carr was only vacationing in the United States. We see no reason that the U.S. interest in protecting transients, who benefit from the protection of their own national governments, should be as great as that in protecting resident aliens.

investment information could be characterized as either conduct or effects in the United States.[13]

If evaluated as an effect, the U.S. interest affected by this transaction is indiscernible for reasons already discussed: the plaintiff is a Panamanian corporation; the individual who placed the purchase orders, and who ultimately suffered any losses, is a Canadian citizen; the securities are not traded on a U.S. exchange; and no effect on a U.S. affiliated company is alleged by EOC. There is, thus, no U.S. entity that Congress could have wished to protect from the machinations of swindlers.[14] Cf. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (declining jurisdiction under the effects test over an allegedly fraudulent sale of foreign securities to a British investment trust with 300 U.S. investors who formed .2% of the trust's fundholders).

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[13] See *Consolidated Gold Fields*, 871 F.2d at 262 (describing the transmittal of offering documents to the United States as an effect); *Leasco*, 468 F.2d at 1335 ("We see no reason why, for the purposes of jurisdiction to impose a rule, making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it.")

[14] EOC objects that the motion to dismiss was granted before discovery was permitted to ascertain the extent of U.S. holdings in and losses from the Fund. The extent of U.S. holdings is often relevant to the issue of whether some alleged frauds affected the United States, but we do not think this is such a case. All the alleged fraudulent representations were made by Arida (or others at Paribas) to Carr personally and perhaps also to O'Brien. The misrepresentations concerned the management and investment practices of the Fund which Carr claims induced him to buy an investment that was not in fact within his investment strategy. Thus, these were by no means the sort of public misrepresentations, such as concealment of a large liability or overstating earnings, that would implicate all U.S. holders of Fund shares, and they are therefore not relevant to the fraud claims.

The analysis becomes somewhat more difficult when we turn to the conduct test. The conduct test in this circuit has been stated in two parts as follows:

> the anti-fraud provisions of the federal securities laws . . . [a]pply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but . . . [d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.

Bersch, 519 F.2d at 993. Or, alternatively, we have said more simply that activity in the United States that is "merely preparatory" to a securities fraud elsewhere will not implicate our antifraud laws. *Itoba,* 54 F.3d at 122 (citing Bersch). EOC's allegations do not fit neatly into either of the two categories outlined in Bersch. Clearly, EOC is not a U.S. entity: even were we to look through the Panamanian corporate identity, its owner, a Canadian citizen, is still foreign. Yet, on the other hand, EOC alleges solicitation and sale of securities within the United States, and the second Bersch category is specifically limited to sales outside the United States. EOC's claim, thus, falls in yet another category which, although identified, was not addressed in Bersch: "losses to foreigners from sales to them within the United States." 519 F.2d at 993. EOC's is a novel factual pattern not squarely governed by any of our decisions to date.

The facts alleged by EOC, nonetheless, satisfy the requirement that U.S. activity directly cause the harm to the foreign interest, which has in the past been the key element of litigation involving the conduct test. Or, stated in the alternative language we have sometimes used, Arida's communications into the United States were more than "mere

preparation" for the fraud. EOC alleges that Arida solicited, offered to sell, and accepted a purchase order for securities from Carr when he was in Florida. Carr also says he relied upon the allegedly misleading information given to him from abroad while he was present in the United States, and such reliance was the direct cause of the loss sustained by EOC. Cf. *Fidenas*, 606 F.2d 5 (all parties were foreign, and this court declined jurisdiction because conduct in the United States was secondary or ancillary to the alleged fraud). The difficult question raised by EOC's allegations is whether Arida's communications to Carr in Florida may be considered activity within the United States for the purpose of the antifraud provisions of the security laws sufficient to support the jurisdiction of this court under the 1934 Act. We believe that they were not.

Although phone calls (or any other communications into the United States) soliciting or conveying an offer to sell securities ordinarily would be sufficient to support jurisdiction, it would be inconsistent with the law of this circuit to accept jurisdiction over this dispute, because the surrounding circumstances show that no relevant interest of the United States was implicated. In other words, a series of calls to a transient foreign national in the United States is not enough to establish jurisdiction under the conduct test without some additional factor tipping the scales in favor of our jurisdiction. Without such added weight, the exercise of prescriptive jurisdiction by Congress would be unreasonable within the meaning of the Restatement of Foreign Relations [hereinafter Restatement] §§ 416 (2) and 403 (1987),[15] and is

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[15] Section 416 of the Restatement addresses "Jurisdiction to Regulate Activities Related to Securities." Subsection (2) of 416 provides:

> Whether the United States may exercise jurisdiction to prescribe with respect to transactions or conduct other than those addressed in Subsection (1) depends on whether such

particularly so when the transaction is clearly subject to the regulatory jurisdiction of another country with a clear and strong interest in redressing any wrong. We do not think Congress intended to make the securities laws have such a broad reach or to make U.S. courts available for such suits.

In the past, we have found jurisdiction over a predominantly foreign securities transaction under the conduct test when, in addition to communications with or meetings in the United States, there has also been a transaction on a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress.[16] All of these factors are absent from

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exercise of jurisdiction is reasonable in the light of § 403, in particular

(a) whether the transaction or conduct has, or can reasonably be expected to have, a substantial effect on a securities market in the United States for securities of the same issuer or on holdings in such securities by United States nationals or residents;

(b) whether representations are made or negotiations are conducted in the United States;

(c) whether the party sought to be subjected to the jurisdiction of the United States is a United States national or resident, or the persons sought to be protected are United States nationals or residents.

Section 403 includes a longer list of generally-applicable factors relevant to the question whether the exercise of prescriptive jurisdiction is reasonable.

[16] *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991) (negotiation with and sale to U.S. parties constituted conduct resulting in the consummation of the fraud); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983) (misleading pamphlet upon which plaintiff allegedly relied emanated from E.F. Hutton's New York office and fraud was completed by trading domestic futures contracts on a U.S. exchange); *IIT v. Cornfeld*, 619 F.2d 909, 918-21 (2d Cir. 1980) (U.S. issuer of securities and preponderance of U.S. activity); *Arthur Lipper Corp. v. Securities*

EOC's allegations. *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148 (2d Cir. 1984), which Judge Friendly indicated was a very close case, *id.* at 154, provides the strongest support of EOC's position, but does not go far enough. Nederland concerned the sale of an interest in a partnership formed by Dutch nationals[17] for the purpose of investing in U.S. real estate. Plaintiff-purchaser was also Dutch. Much of the negotiation during which the alleged misrepresentations were made occurred in the United States, but the deal was concluded abroad. Even though the consummation of the allegedly fraud-tainted sale occurred outside the United States, Judge Friendly's opinion found jurisdiction, after considering the many factors listed in § 403(2) of Tentative Draft No.2 of the current Restatement.[18] *Id.* Specifically, the opinion found the extent

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and Exch. Comm'n, 547 F.2d 171, 179 (2d Cir. 1976) ("The fraud charged by the SEC was perpetrated in the United States by payments from one registered broker-dealer . . . to another . . . ."); *Leasco*, 468 F.2d at 1338 ("The defendants themselves recognized that Leasco, the United States company, remained at all times intimately involved in the transaction; the foreign entity was accepted by both sides as the alter ego of the American.").

[17] The seller was a partnership of two Dutchmen formed under Georgia law, but the court considered it a Dutch entity. *Nederland*, 740 F.2d at 154.

[18] Section 403(2) of the Tentative Draft provided: "Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:

> (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
>
> (b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance

of the activity within the regulating state and the economic activity connecting both the plaintiff and defendants to the United States weighed in favor of jurisdiction. Presumably, although the opinion does not say as much, it considered the U.S. real estate investments, which were the purpose of the partnership and the subject of the alleged fraud, to be economic activity connecting the parties to the United States within the meaning of § 403(2)(b) of the Tentative Draft. In any event, we find Nederland distinguishable for this reason. The sales by Paribas to EOC have no similar connection to the United States: EOC invested in Europe; and Paribas's offices in and any other connections to the United States have no relevance to these transactions. We therefore find that the slight additional factor of economic activity in the United States, which "tipped the balance" in favor of jurisdiction in Nederland, is absent from EOC's case.

In this case, there is no U.S. party to protect or punish, despite the fact that the most important piece of the alleged fraud -- reliance on a misrepresentation -- may have taken place in this country. Congress may not be presumed to have prescribed rules governing activity with strong connections to another country, if the exercise of such

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of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of regulation to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity;

(h) the likelihood of conflict with regulation by other states."

Nederland, 740 F.2d at 154 n.9.

jurisdiction would be unreasonable in the light of established principles of U.S. and international law. See Restatement § 403. And, the answer to the question of what jurisdiction is reasonable depends in part on the regulated subject matter. *Id.* cmt. c. ("Regulation by the United States of the labor relations of a foreign vessel that regularly calls on the United States may be unreasonable; regulation of the vessel's safety standards may not be unreasonable.")

This case illustrates the kind of circumstances in which it is unreasonable to prescribe rules of conduct with respect to securities fraud, even when a misrepresentation is made in the United States and reliance occurs on U.S. soil. Section 10(b), although it sounds in the common law tort of fraud, is part of a regulatory system that serves the public interest of the United States in much the same way as banking and currency regulations. This apparent purpose of protecting and regulating an entire system led this court to extend, through the use of the effects test, the antifraud provisions of these laws to activity not ordinarily within the "presumptive" scope of legislation. See *Equal Employ. Opp. Comm'n v. Arabian American Oil Co.*, 499 U.S. 244, 248 111 S. Ct. 1227, 1230, 113 L. Ed. 2d 274 (1991) (legislation presumptively territorial); *Zoelsch*, 824 F.2d at 31 (same) (collecting cases).[19] The very considerations that have led this court to conclude that Congress meant for the securities

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[19] After adopting the Second Circuit's "conduct" test for the extraterritorial application of U.S. securities fraud laws, Judge Bork's opinion in *Zoelsch* noted "the test we adopt here does provide jurisdiction whenever any individual is defrauded in this country, regardless of whether the offer originates somewhere else, for the actual consummation of securities fraud in the United States in and of itself would constitute domestic conduct that satisfies all the elements of liability." *Zoelsch*, 824 F.2d at 33 n.4. We agree with this general statement, but think it inapplicable when, as here, there is no U.S. citizen, resident or other identifiable U.S. interest concerned.

antifraud laws to reach beyond our shores to certain fraudulent activities abroad militate against finding subject matter jurisdiction over EOC's complaint. It would be ironic if a foreign party seeking redress in a U.S. court could sidestep the effect requirement by stretching our notions of conduct in the United States to include telephone calls from abroad to an agent/owner of that party here fortuitously. The situation is entirely different from the difficult cases under the conduct test in which a U.S. person or entity is the source of misleading information causing harm elsewhere. The U.S. interest in punishing an English malfeasor working at a French bank branch in London who caused no harm here is not apparent. We therefore hold that the alleged solicitation, offer to sell, and purchases occurring while Carr was present in Florida did not bring this otherwise entirely foreign transaction within the antifraud provisions of U.S. securities law.

D. O'Brien's relevance to this appeal.

O'Brien is not a plaintiff in this proceeding. Apparently recognizing, however, that if he were, a marginally stronger case for subject matter jurisdiction would be before us, EOC continues to press the facts of O'Brien's case on this appeal as it did in the proceedings below. O'Brien purchased shares in his own name, rather than through an offshore company as did Carr. He also may have been a Florida resident at the time of his purchase, even though he made contrary representations to Paribas. And, O'Brien may not have had a preexisting relationship with Paribas at the time of his purchase, but even this fact is not clear from Carr's declarations. Indeed, we do not even know where O'Brien was at the time he executed his subscription agreement, or from where the agreement was sent. Despite EOC's insistence, we need not decide whether we would have jurisdiction over securities fraud or registration claims brought by O'Brien, because he is not a party to this action.

Cf. *Fidenas*, 606 F.2d at 8 (accepting on appeal a distinction drawn by the district court between subject matter jurisdiction over the claims of individual plaintiffs, on the one hand, and class actions or derivative suits, on the other).

Viewed as an effect in the United States for the purpose of our jurisdiction over the fraud alleged by EOC, it is hard to see what O'Brien adds to EOC's position. First, O'Brien told the bank that he was a British subject, residing in London, who could be reached in the United States where he was on business. Thus, from the bank's point of view, he had no more of a connection to the United States than did Carr or EOC. Second, any loss he sustained was isolated; it did not have a significant impact on U.S. markets or investors. We cannot see how he changes the lack of any U.S. interest in the alleged fraud. Similarly, O'Brien adds little to EOC's registration claims: his purchase does not support an inference that the bank offered unregistered securities to a person it knew was a resident or citizen of the United States. And, for the same reason, O'Brien cannot be considered evidence of a U.S. market interest in the Fund. O'Brien's purchase does not, therefore, present any reason to alter our conclusion that the sale to EOC was outside the United States for the purpose of § 5.

Conclusion

The decision of the district court dismissing plaintiff EOC's complaint for lack of subject matter jurisdiction is affirmed.

APPENDIX B
940 F. Supp. 528

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A., Plaintiff,

v.

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD., and JOHN ARIDA, Defendants.

94 Civ. 7471 (BSJ)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

June 19, 1996, amended June 28, 1996

For EUROPE & OVERSEAS COMMODITY TRADERS, S.A., plaintiff: John J.D. McFerrin-Clancy, Schlam Stone & Dolan, New York, NY.

For BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD., JOHN ARIDA, defendants: J. Portis Hicks, Winthrop, Stimson, Putnam & Roberts, New York, NY.

AMENDED MEMORANDUM DECISION[1]

BARBARA S. JONES, United States District Judge

Plaintiff Europe and Overseas Commodity Traders, S.A. ("EOC") brings this action alleging eleven counts arising out of the alleged fraudulent sale of securities by Banque Paribas London ("Paribas"), Paribas Global Bond Futures Fund (the "Fund"), Paribas Asset Management Ltd. (the "Fund Manager"), and John Arida ("Arida") (collectively referred to as "Defendants").

Defendants move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b), claiming that this Court lacks subject matter jurisdiction over the case and personal jurisdiction over the defendants. In the alternative, defendants move the Court to dismiss this action on the grounds of forum non conveniens. For the reasons set forth below, defendants' motion is hereby granted.

Background

The following facts are taken from the pleadings and supporting affidavits.[2] Defendant Paribas, a French

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[1] This amended memorandum decision replaces the memorandum decision issued in this case on June 19, 1996. See correct citation for *Allstate Life Insur. Co. v. Linter Group Ltd.* on page 537.

[2] For the purposes of a motion to dismiss on the grounds of lack of subject matter jurisdiction under Rule 12(b)(1), the Court may consider the complaint as well as outside materials such as affidavits. *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986). In support of their motion, defendants submitted affidavits from John Baker, compliance officer of the London branch office of Paribas (hereinafter "Baker decl."); John Arida, a defendant who was employed in the London branch office of Paribas (hereinafter "Arida decl."); Pierre Corbiau, an employee of Banque Paribas Luxembourg and secretary of Paribas Global Bond Futures Fund

corporation, created and controls defendant Paribas Global Bond Futures Fund, a corporation organized under the laws of Luxembourg. Paribas is also the parent of defendant Paribas Asset Management, a Bahamian corporation, which is the manager of the Fund. Defendant John Arida, a United Kingdom national, was employed by Paribas in London as an account manager during the period of time relevant to the complaint; in that capacity, he advised investors who maintained accounts with Paribas regarding their investment options. Arida decl. at ¶ 2.

Plaintiff is a Panamanian corporation with its principal place of business in Monaco.[3] Its sole shareholder is Alan Carr, a Canadian citizen, who for most of the time of the investment at issue was residing in Florida. Plaintiff EOC established a securities trading account with Paribas in London in or about October 1992 by entering an Investment Agreement. The Investment Agreement contains choice of law and choice of forum provisions which state that "[t]his

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(hereinafter "Corbiau decl."); Denis Coulon, a director of Paribas Asset Management Ltd. (hereinafter "Coulon decl."); and Andrew Charles Smith, an English attorney (hereinafter "Smith decl."). Plaintiff submitted a declaration from shareholder Carr (hereinafter "Carr decl."). Also, defendants submitted a further declaration from Mr. Baker (hereinafter "Baker reply decl."), plaintiff submitted a further declaration from Mr. Carr (hereinafter "Carr sur-reply decl.") and defendants submitted a final declaration from Mr. Baker (hereinafter "Baker response to Carr sur-reply decl.").

[3] Plaintiff disputes that its principal place of business is in Monaco, contending that its sole business is the making of investments, activity for which "it does not need and does not maintain any formal offices for the conduct of its investment business." Carr decl. at ¶ 3. Defendants contend, on the other hand, that plaintiff does indeed maintain business offices in Monaco, as reflected in the business address listed in the Investment Agreement it entered with Paribas. In that Agreement, plaintiff also listed Monaco as the place where shareholder and directors meetings are held. Based on the record, this Court finds that plaintiff's principal place of business is in Monaco.

Agreement is governed by English Law. Disputes arising out of the Agreement shall be subject to the jurisdiction of the English courts to which for our benefit you submit."

In October 1993, EOC invested in the Fund using the account it established with Paribas. The circumstances surrounding plaintiff's initial purchase of shares in the Fund are in dispute. Both parties agree that Carr was in England for a period of time in the fall of 1993 and that he left England on October 9, 1993. Carr concedes that before he left, he was introduced to Arida and had conversations with him concerning the securities trading account he held with Paribas. Carr denies that Arida solicited the investment in the Fund during these conversations; rather, he avers that Arida solicited the purchases by telephone and facsimile while Carr was in Florida between October 14 and October 18. Carr claims that he made the first purchase in the Fund on October 18, and he made subsequent purchases in October and November.

Arida contends, however, that Carr placed the initial order of shares in the Fund on behalf of EOC on October 8, *before* he left England, rather than on October 18, as plaintiff contends. Arida concedes that after Carr made this initial purchase in England, he had several communications with Carr regarding EOC's investment in the Fund while Carr was in Florida, beginning on or about October 14. Arida agrees that during the period of October through November 1993 EOC made further investments in shares in the Fund.

Each side has submitted documentary evidence to support its position as to when the initial purchase was made. To support its allegation that the initial purchase was made while Carr was in Florida on October 18, 1993, plaintiff submits a June 15, 1994, letter from Arida listing EOC's purchases in the Fund which indeed lists the date for the first

purchase as October 18, 1993. The Court finds this letter unpersuasive for two reasons.

First, under the Fund rules governing share valuation, the share price Carr claims to have paid on October 18 is incorrect. Under the Fund Rules, a "purchase" of shares of the Fund can occur only on a valuation day at their then-applicable net asset value; valuation days, which determine the purchase price of Fund shares, are Mondays. In addition, "applications for purchase received ... not later than 1:00 p.m. on the second bank business day preceding a Valuation Day will, if accepted, be dealt with on the basis of the relevant Net Asset Value calculated at such Valuation day . . ." Baker reply decl. at ¶ 5. As applied to EOC's purchase, an order for the purchase of Fund shares placed on October 8, 1993, a Friday, could not be valued on Monday, October 11, 1996, because October 11 was less than two business days from the date the order was placed. Rather, the shares would have been valued (i.e., their purchase price determined) on Monday, October 18.[4] Significantly, Carr acknowledges that on his initial purchase, he paid the price per share which was

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[4] Defendants contend that after plaintiff placed its initial purchase order on October 8, 1993, Arida had his assistant, Janice Scarr, send a facsimile to the Fund in order to place this purchase order. The fax does not refer to the name of the person or entity who is placing the purchase. It simply reflects that an order was submitted on October 8. Also, it places an order for five shares in the Fund. This number of units is significant because plaintiff's initial purchase, as reflected in the June 15, 1994, letter sent by Arida to Carr, was for ten shares.

Baker explains that this initial purchase for five shares was combined with another purchase of five shares that plaintiff placed on October 14. This is supported by plaintiff's phone records which reflect that calls were made by Carr to Arida on October 14 and 15. Carr sur-reply decl. ¶ 21 and exhibit. Baker explains that all ten shares -- the five ordered on October 8 and the five ordered on October 14 -- were valued on the same day, October 18, 1993. In support of this theory, defendants submit a record kept by Paribas which reflects that ten shares purchased by plaintiff were valued on October 18, 1996, and were settled (i.e., paid for) three days later.

listed as the value on October 18, 1993. Carr decl. ¶ 12. If Carr had in fact placed the order for the securities on October 18, he would have paid the amount which was the value on October 25 under the rules of the Fund.[5]

The second reason the Court finds the June 15, 1994, letter from Arida to Carr unpersuasive is that the letter is internally inconsistent. Some of the dates listed as "purchases" are valuation dates, suggesting that the date referred to as the date of "purchase" was in fact the date of valuation. Some of the dates listed as "purchases" are "settlement" dates, suggesting that the "purchase" referenced was the payment date. Some of the dates do not correspond to either purchase or settlement dates and thus might actually represent purchase order dates. Because neither plaintiff nor defendants has provided a wholly satisfactory explanation for the dates in this letter, this Court concludes that Arida was using the term "purchase" loosely to refer to each of the above three possibilities.

Thus, construing all facts in favor of the plaintiff, keeping in mind that this Court need not draw all argumentative inferences in favor of the plaintiff, *Atlantic Mutual Insur. Co. v. Balfour MacLaine International Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992), this Court finds that plaintiff's initial purchase of shares in the Fund was made in England on October 8, 1993.

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[5] Plaintiff contends, however, that he was told that the "two business days" rule would not apply to his purchase. If the rules truly did not apply to plaintiff's purchases, then Carr could have purchased shares on October 18 and had them valued on the very same day. Baker asserts that even if Arida did make such a representation, it has no bearing on when the initial purchase was made because the two-day rule did in fact apply to plaintiff's purchases. Other than Carr's unsupported claim that he believed the Fund rules would not apply to his purchases, this Court finds no reason to believe that the Fund rules of valuation did not apply to this particular transaction.

Neither party disputes that after several phone calls and facsimiles between Arida and Carr while Carr was in Florida during October and November 1993, plaintiff made additional purchases in the Fund. Plaintiff also contends that during the month of October, Paribas solicited and sold shares in the Fund to another investor, Matthew O'Brien, who is not a party to this action. Plaintiff avers that Mr. O'Brien is a resident alien in the United States and a British subject who was residing in Florida at the time of his investment. Plaintiff's allegation is unsupported: it has not submitted an affidavit by O'Brien himself. However, defendants have submitted O'Brien's investment application which reflects that at the time that O'Brien applied to make a purchase in the Fund, he listed his residence as London and his citizenship as British. See Baker reply decl.¶ 10, exh. 6. Plaintiff offers nothing to controvert this evidence other than his averment that O'Brien was resident in Florida at the time of purchase, and in fact now is a citizen of the United States. See Carr decl.. at ¶ 19. Thus this Court credits the defendants' submission, and in light of this submission, finds that O'Brien resided in England at the time of his investment in the Fund.

Plaintiff alleges that during the course of solicitation -- both before and after the initial purchase -- Arida made various misrepresentations regarding the nature of the Fund that later proved to be false. Plaintiff claims that he entered into the investment on the basis of those misrepresentations and invested a total of $1,788,805.25. The value of the Fund declined in early 1994. As of May 31, 1994, EOC's account in the Fund was $774,274.60; as a result of the decline in the Fund's value, plaintiff's claimed loss is about $1,000,000.

Discussion

Defendants move to dismiss plaintiff's complaint on three grounds: lack of subject matter jurisdiction, lack of personal jurisdiction and under the doctrine of forum non conveniens. Before it can consider a forum non conveniens motion, a court must first determine whether it has jurisdiction over the case and the parties. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 91 L. Ed. 1055, 67 S. Ct. 839 (1947).

Subject Matter Jurisdiction

The Court must consider whether there is subject matter jurisdiction based on a federal question pursuant to 28 U.S.C. 1331.[6] The Securities Exchange Act is silent as to extraterritorial application. See e.g., *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.), cert. denied, 502 U.S. 1005, 116 L. Ed. 2d 656, 112 S. Ct. 638 (1991). In order to determine whether a federal court has subject matter jurisdiction over federal securities claims brought by foreign plaintiffs, courts must determine whether "Congress intended that the precious resources of the United States courts be devoted to a specific transnational securities claim." *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121-22 (2d Cir. 1995) (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), cert. denied sub nom, *Bersch v. Arthur Andersen & Co.*, 423 U.S.

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[6] Plaintiff's complaint is deemed amended to allege federal question jurisdiction rather than diversity jurisdiction, as plaintiff has explained that its reference in the complaint to section 1332 was a typographical error and concedes that there is no diversity jurisdiction here. Subject matter jurisdiction cannot be based on diversity jurisdiction pursuant to section 1332 because neither the plaintiff nor any of the defendants are citizens of the United States. As it is well-established that the federal courts will not entertain actions between aliens, jurisdiction fails under section 1332. See, e.g., *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 789-90 (2d Cir. 1980).

1018, 46 L. Ed. 2d 389, 96 S. Ct. 453 (1975)), cert. denied, 133 L. Ed. 2d 659, 116 S. Ct. 702, 116 S. Ct. 703 (1996). In making this determination, courts apply the "conduct test" or the "effects test." The Second Circuit has stated that these two tests can be applied in conjunction. "Indeed an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." *Itoba*, 54 F.3d at 122

Under the "effects" test, a federal court has subject matter jurisdiction if the defendant's conduct abroad has "substantial" impact in the United States, see *Alfadda*, 935 F.2d at 478, that is, if the conduct impacts on "stock registered and listed on [an American] national securities exchange and [is] detrimental to the interests of American investors." *Itoba*, 54 F.3d at 124 (quoting *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d. Cir.), rev'd with respect to holding on merits, 405 F.2d 215 (2d Cir. 1968) (in banc), cert. denied sub nom. *Manley v. Schoenbaum*, 395 U.S. 906, 23 L. Ed. 2d 219, 89 S. Ct. 1747 (1969) (brackets in original)). Under the "conduct" test, a federal court has subject matter jurisdiction if the defendant committed acts in the United States that were more than merely preparatory to the fraud, and those acts or culpable failures to act within the United States directly caused the claimed loss. *Alfadda v. Fenn*, 935 F.2d at 478.

Effects Test

The plaintiff has failed to establish that this Court has subject matter jurisdiction under the effects test, because defendants's alleged acts have not caused "substantial" impact in the United States. The shares are not registered or listed on an American securities exchange: the Fund is a foreign investment entity which has no place of business in the United States, and none of its investors are United States

citizens or residents. Corbiau decl. ¶¶ 3-4. Moreover, plaintiff's purchase was made on its London account. Although plaintiff may have suffered loss as a result of the alleged fraud, plaintiff is a Panamanian corporation with its place of business in Monaco. Its loss was not suffered in the United States, despite the fact that plaintiff's sole shareholder placed subsequent orders while he happened to be in Florida.

Plaintiff further attempts to satisfy the effects test by alleging that another investor, O'Brien, purchased shares in the Fund while he resided in the United States and thus the loss that he suffered occurred in the United States. This Court has already found that O'Brien was residing in England at the time of his investment in the Fund.[7] As such, plaintiff has failed to show that the defendants' alleged fraud had an effect on an investor in the United States.

Having concluded that defendants' conduct abroad has no impact in the United States, this Court must examine whether the conduct test provides a basis for the exercise of subject matter jurisdiction over plaintiff's claims.

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[7] Moreover, even if this Court had found that O'Brien was residing in the United States at the time of his investment and as a result, his loss were considered to have occurred in the United States, his loss would not constitute a substantial effect in the United States without further allegations of other American investors. Plaintiff nowhere states what Mr. O'Brien lost from his $100,000 investment in the Fund. *Compare Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.) (holding that ownership by American residents representing 2.5% of plaintiff's shareholders and 5.3 million shares with a market value of about $120 million constitutes a substantial effect in the United States), cert. dismissed, 492 U.S. 939, 106 L. Ed. 2d 639, 110 S. Ct. 29 (1989).

Conduct Test

In considering the conduct test, the Court of Appeals stated that the securities laws may be given extraterritorial effect to protect "foreigners residing outside the United States if acts or culpable omissions within the United States directly caused losses to be sustained." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d at 993. This standard implicitly recognizes that "the less interest this country has in a defrauded investor, the greater the contacts the fraud must have with this country before extraterritorial application will be given to the Securities Act." *O'Driscoll v. Merrill Lynch*, No. 83 Civ. 616, 1983 WL 1360, at *3 (S.D.N.Y. September 8, 1983), modified on motion, No. 83 Civ. 616 (CBM) (unpub.) (S.D.N.Y. January 5, 1984). In the instant case, plaintiff is a foreigner residing abroad because it is a Panamanian corporation with offices in Monaco.[8] In order for this Court to have subject matter jurisdiction under the conduct test, plaintiff must show that misrepresentations made to plaintiff's sole shareholder while he was in the United States directly caused plaintiff's loss.

This Court has found that the initial order of shares in the Fund occurred while Carr was in England; after Carr left England, however, Arida and Carr continued to communicate by telephone and facsimile while Carr was in

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[8] Plaintiff argues that, as an alter ego of its sole shareholder Carr, it is located wherever Carr is located, and like him, is a resident alien. This Court rejects this argument, see *O'Driscoll*, 1983 WL 1360, at *3 n.8 ("Whatever his reasons may have been, O'Driscoll set up Bernat as an offshore corporation with its offices thousands of miles away."), because it is the status of the plaintiffs, defendants, and the transaction that is critical. See CA 79-3030 *Fidenas AG v. Compagnie Internationale*, 606 F.2d 5, 8 (2d Cir. 1979) (approving lower court's findings).

Florida.[9] During these transatlantic communications, Arida allegedly made further misrepresentations in order to solicit additional purchases by plaintiff in the Fund. These communications constitute activity "within" the United States. *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1335 (2d Cir. 1972) ("[W]e see no reason why, for the purposes of jurisdiction to impose a rule, making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it.")

The Court of Appeals has stated that subject matter jurisdiction under the conduct test is based upon the "perpetration of fraudulent acts themselves [but] does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries." *IIT v. Vencap*, 519 F.2d 1001, 1018 (2d Cir. 1975); see *Alfadda v. Fenn*, 935 F.2d at 478. The only domestic acts--the transatlantic communications aimed at inducing plaintiff's further investment in the Fund -- were merely a continuation of the fraud that was already consummated in England with plaintiff's initial investment.

Furthermore, this Court is guided by the principle that direct causation depends "not only on how much was done in the United States but also on how much ... was done abroad." *IIT v. Cornfeld*, 619 F.2d 909, 920-21 (2d Cir. 1980) (footnote omitted). In the instant case, the following acts were done abroad: plaintiff opened the trading account with Paribas in London; plaintiff placed the initial order of shares in the Fund while Carr was in London; each time plaintiff ordered the purchase of shares in the Fund, the actual purchase was made in London, as the funds used to pay for the shares were debited from plaintiff's trading

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[9] These communications were sometimes initiated by Arida and sometimes initiated by Carr. See Arida decl. at ¶ 8.

account with Paribas, Carr Sur-Reply decl. ¶ 9; and internal communications were made by defendants abroad so that defendants could process plaintiff's purchases in the Fund. On the other hand, the acts that were done in the United States were additional communications between Arida and Carr in order to solicit the further investment by plaintiff in the Fund. Consideration of defendants' activities both domestically and abroad reveals that the acts that were done in the United States are outweighed by the acts that were done abroad -- the establishment of the account, the initial purchase order, and the actual purchases with the funds in the account -- which essentially constitute the core of the transaction. See *O'Driscoll*, 1983 WL 1360, *5 (acts in the United States to conceal churning scheme were found not to constitute the direct cause of plaintiff's loss); *Butte Mining PLC v. Smith*, 876 F. Supp. 1153 (D. Mont. 1995), aff'd, 76 F.3d 287 (9th Cir. 1996). Compare *Ohman v. Kahn*, 685 F. Supp. 1302, 1306 (S.D.N.Y. 1988). The communications made while Carr was in Florida were only ancillary to the initial fraud in London and therefore can not be said to have directly caused plaintiff's loss.

Moreover, the rationale underlying the conduct test illustrates that its application here to establish subject matter jurisdiction is inappropriate. The Court of Appeals has reiterated that "[i]nherent in the conduct test is the principle that Congress does not 'want the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.'" *Itoba*, 54 F.3d at 122 (quoting *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983) (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975)). In the instant case, the United States was never used or intended to be used as a base for manufacturing fraudulent securities for export. Rather, the securities at issue were sold to plaintiff's shareholder first while he was in England, and then again when he happened to be residing in Florida. Shareholder

Carr's presence in Florida is pure happenstance in the context of this transaction, and cannot serve as the basis for conferring subject matter jurisdiction for plaintiff's claims which arise out of foreign transactions that have nothing to do with the United States.

Even applying a mixture of the conduct and effects test, as permitted by *Itoba*, fails to establish subject matter jurisdiction. As set forth above, defendants' alleged fraud had no effect at all in the United States or on an American investor. Combining this non-existent "effect" with the transatlantic communications aimed at soliciting plaintiff's further investment – which alone do not rise to the level of direct causation of plaintiff's injury -- can not possibly bolster the argument for subject matter jurisdiction. To the contrary, combining the tests in an effort to establish subject matter jurisdiction serves only to highlight the underlying foreign nature of the transaction.

Accordingly, this Court finds that there is no subject matter jurisdiction over plaintiff's claims.

Forum Non Conveniens

Even if this Court were to find that it had subject matter jurisdiction under either the conduct or effects test, the case would have to be dismissed on the grounds of *forum* non conveniens as to any defendants over whom this Court could exercise personal jurisdiction.[10] Only defendant

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[10] The Securities Exchange Act permits the exercise of personal jurisdiction to the limit of the Due Process Clause of the Fifth Amendment, *Bersch v. Drexel Firestone*, 519 F.2d at 998; *Leasco*, 468 F.2d at 1339, which "allows the exercise of personal jurisdiction over a defendant whose 'conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100

Paribas is subject to personal jurisdiction.[11] As to Paribas, this Court would dismiss the action on the grounds of *forum non conveniens*.

In its discretion, a court can dismiss an action on the grounds of *forum non conveniens* when there is an

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S. Ct. 559 (1980)). Under Due Process principles, a defendant should have at least minimum contacts with the forum state in order to make extraterritorial service foreseeable, so that maintenance of the suit in the forum will not offend traditional notions of fair play and substantial justice. See *Asahi Metal Indus. v. Superior Court of Calif.*, 480 U.S. 102, 113, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987).

[11] Under the Restatement (Second) of Conflict of Laws (1971) which this Circuit uses as a guide to assessing whether there is personal jurisdiction over a foreign defendant when claims are made under federal securities laws, courts may exercise personal jurisdiction where (1) the defendant does business in the forum [§ 35], (2) the defendant does an act in the forum with respect to a cause of action in tort arising from that tort [§ 36], or (3) causes an effect in the forum by an act done elsewhere [§ 37]. Defendants concede that Paribas does business in the United States and thus is subject to personal jurisdiction in the United States.

By contrast, Arida, the Fund, and the Fund Manager are not subject to personal jurisdiction. Although Arida did an act in the forum by virtue of his transatlantic communications with Carr, such acts did not make being subject to jurisdiction in the United States reasonably foreseeable: Arida believed that he was soliciting the investment of plaintiff a foreign corporation, and not Carr, who was residing in the United States at the time Arida made some contacts with him. To subject him to jurisdiction based on these phone calls would offend traditional notions of fair play and substantial justice.

With respect to the other defendants, the Fund is a foreign entity whose shares are not registered in the United States and are not sold to American investors. Both the Fund and the Fund Manager contemplated that the investor was plaintiff, a Panamanian corporation with its office in Monaco, rather than Carr. Neither the Fund nor the Fund Manager have had minimum contacts with the United States. Even if Arida were acting on behalf of the Fund and the Fund Manager as an agent, which he denies, personal jurisdiction over the Fund and the Fund Manager would nevertheless be unavailing because this Court may not assert jurisdiction over Arida. Accordingly, the only defendant over whom this Court has personal jurisdiction is Paribas.

alternative forum to hear the case and when trial in the chosen forum would be oppressive and vexatious to the defendant out of all proportion to the convenience to the plaintiff, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems. *Gulf Oil Corp v. Gilbert,* 330 U.S. 501, 508-09, 91 L. Ed. 1055, 67 S. Ct. 839 (1947).

To guide the determination of convenience, the Supreme Court listed factors a court should consider relating to "private" interests applicable to the litigants, and "public" interests, applicable to the court. Factors involving the private interest include (i) ease of access to sources of proof, (ii) availability of compulsory process for attendance of unwilling witnesses, (iii) access to documents, (iv) other practical considerations that make trial of a case easy, expeditious and inexpensive, and (v) enforceability of a judgment once it is obtained. Factors involving the public interest include (i) the problems of court congestion, (ii) local interest in the controversy, (iii) the advantages of having a court familiar with the law, and (iv) the unfairness of burdening courts in an unrelated forum with jury duty. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 241, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981); *Gulf Oil Corp v. Gilbert,* 330 U.S. 501, 508-09, 91 L. Ed. 1055, 67 S. Ct. 839 (1947).

A. Alternative Forum

The Supreme Court has stated that "dismissal on grounds of forum non conveniens may be granted even though the law applicable in the alternative forum is less favorable to the plaintiffs' chance of recovery." Courts should consider the law in the alternative forum on a *forum non conveniens* motion only where "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft,* 454 U.S. at 254.

Plaintiff urges that the remedy offered by the alternative forum of the United Kingdom is unsatisfactory because at the heart of plaintiff's action are claims under federal securities laws. The fact that plaintiff's claims arise under federal law does not, however, make the United Kingdom a per se inadequate forum. See *Allstate Life Insur. Co. v. Linter Group Ltd.*, 782 F. Supp. 215 (S.D.N.Y. 1992). Rather, it is one factor that this Court may consider in determining the adequacy of the alternative forum. Moreover, "*some* inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." *Borden Inc. v. Meiji Milk Products Co.*, 919 F.2d 822, 829 (2d Cir. 1990) (citation omitted), cert. denied, 500 U.S. 953, 114 L. Ed. 2d 712, 111 S. Ct. 2259 (1991).

Defendants have submitted an affidavit by a lawyer admitted to practice in England who avers that the English Courts allow rescission of contracts induced by misrepresentation and awards damages for fraudulent misrepresentation and for negligent misrepresentation. Further, if the plaintiff relied on misrepresentations made by Arida, plaintiff could claim that Paribas is vicariously liable in damages for his misrepresentations. Smith decl. ¶¶ 16-17. Moreover, plaintiff would have certain claims under the securities laws of the United Kingdom, including the rules of the Securities and Futures Authority, a self-regulating organization; violation of these rules provides a civil remedy in damages. *Id.* ¶¶ 18-23. Based on the affidavit of Mr. Smith, this Court is persuaded that an English forum applying English law would provide plaintiff with an adequate remedy.

For the foregoing reasons, the Court finds that an adequate alternative forum exists.

B. Plaintiff's Choice of Forum

Courts generally give deference to a plaintiff's choice of forum because it is assumed that a plaintiff will choose a convenient forum. See *Piper Aircraft Co.*, 454 U.S. at 256 n.23. Where, however, the plaintiff is foreign, its choice of forum is entitled to less deference. *Id.*; *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 290 (2d Cir. 1996). Plaintiff attempts to bolster the presumption that his choice is convenient by citing authority for the proposition that although a foreign plaintiff's choice may be given less deference, a plaintiff can overcome this by making a strong showing of convenience.

Plaintiff has failed to show that the forum of the United States courts, let alone the United States District Court for the Southern District of New York, is at all convenient. Plaintiff is a Panamanian corporation with its principal place of business in Monaco; its sole shareholder is a Canadian citizen who resides for less than a majority of the year in Florida. Carr decl. ¶ 2. Each of the defendants is foreign. The alleged fraud occurred both in England and by transatlantic communications while defendant was in England and plaintiff's shareholder was in Florida. Because the plaintiff fails to make any showing of convenience, its choice of forum is deserving only of "some weight." *Murray*, 81 F.3d at 290.

C. Private Interest Factors

1. Access to Source of Proof: Documents

Plaintiff argues that all of the documents are in the United States because they were faxed to him while he was in Florida. Defendants, on the other hand, contend that all of the documents relating to the investment account, Paribas, the Fund and plaintiff corporation itself are located overseas.

In order to litigate the fraud claims, the parties inevitably will need to present to the court documents relating to the investment account held by defendant Paribas for EOC, the losses experienced by plaintiff corporation, and the Fund itself. These documents are located overseas and therefore weigh in favor of defendants' motion to dismiss.

Nevertheless, in light of technological advances in transportation and communication, this Court recognizes that the location of documents is a factor which is to be given less weight now, almost fifty years after the Supreme Court's initial listing of private interest factors in Gilbert. See *Overseas Programming Co. v. Cinematographische Commerz-Anstalt,* 684 F.2d 232 (2d Cir. 1982).

2. Compulsory Process for Unwilling Witnesses and Costs of Obtaining Willing Witnesses

Plaintiff contends the witnesses it will need are non-parties who participated in the sale or purchase of the unregistered securities in the United States. According to plaintiff, the fact that these witnesses could not be compelled to testify in England would result in prejudice to plaintiff. Nevertheless, this Court notes that these "witnesses" -- who are claimed to be other American investors who invested in the Fund -- have not yet been identified. The witnesses that have been identified are defendants' witnesses, including the bank employees who were witness to the transactions. Five of the defendants' witnesses could not be compelled to testify in the United States. See Baker supplemental decl. ¶ 4.

All of the identified witnesses, with the possible exception of Carr, reside overseas.[12] Thus transporting

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[12] Carr resides for only part of each year in the United States. It is unclear where he resides for the remaining part of each year.

witnesses from England to the United States -- even if they were within this Court's subpoena power or would appear voluntarily -- would be extremely inconvenient and would impose a prohibitive cost on defendants. See e.g., *Scottish Air International, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1232-33 (2d Cir. 1996). Furthermore, the Court of Appeals has recently affirmed the principle that live testimony of key witnesses is necessary "where the plaintiffs alleged that the defendants had conspired to defraud them." *Id.*

3. Forum Selection and Choice of Law Clauses

The Investment Agreement entered into by EOC and Paribas when EOC initially established its account with Paribas in October 1992 contains choice of law and choice of forum clauses. The Investment Agreement "this Agreement is governed by English Law. Disputes arising out of the Agreement shall be subject to the jurisdiction of the English courts to which for our benefit you submit." Baker decl. at ¶ 7, exh. 1.

Parties dispute whether plaintiff's action "arises out of" the Investment Agreement that contains the forum selection and choice of law clause. In *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456 (S.D.N.Y. 1990), the plaintiff had opened an account with defendant bank in Switzerland by a series of agreements which provided that Swiss law would govern all relations between defendant and plaintiff in a Swiss forum. Plaintiff's action alleged, *inter alia*, that it purchased certain securities using funds it had deposited into an account established with defendant because of false statements made by defendant's employees. The court found that this dispute was governed by Swiss law because the "action arises out of the relationship created when the parties signed the forms containing the forum-selection clause." 729 F. Supp. at 1458. See also *Scherk v. Alberto-Culver Co.*, 417

U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974) (holding that controversies and claims "arising out of" a contract for the sale of a business covered securities violations related to that sale); *Roby v. Corporation of Lloyd's,* 996 F.2d 1353 (2d Cir. 1993) (rejecting, based on Supreme Court precedent, plaintiff's argument that only allegations of contractual violations fall within the scope of the forum selection and arbitration clauses), cert. denied, 510 U.S. 945, 126 L. Ed. 2d 333, 114 S. Ct. 385 (1993).

The facts of *Medoil* closely resemble the facts of the case at bar. Plaintiff EOC claims that defendants violated securities laws in connection with the sale of securities on an account established by the Investment Agreement which contains a forum selection clause. These claims "arise out of" the relationship between plaintiff and defendant Paribas which was established by the Investment Agreement.

Moreover, "[i]t defies reason to suggest that a plaintiff may circumvent forum selection ... clauses merely by stating claims under laws not recognized by the forum selected in the agreement." *Roby,* 996 F.2d at 1360. Thus, the fact that plaintiff brings claims under the United States securities laws can not preclude the application of English law which both parties contemplated would govern. Furthermore, this Court recognizes the strong public policy in favor of forum selection clauses. See e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). In light of the clear intention of the parties to be governed by English law in an English forum with respect to disputes arising from that agreement, this Court finds that English law must govern this case in an English forum.

E. Public Interest Factors

1. Court congestion

There would be little delay in either forum. In this Court, a date for trial would be set for shortly after the completion of discovery and determination of any further motions. In England, a date generally would be set for trial within six months after the completion of discovery. See Smith decl. at ¶ 29.

2. Local Interest in Controversy

The United States does have an interest in affording United States citizens a forum, in enforcing its securities laws, and in preserving the integrity of markets for securities in the United States. See, e.g., *Allstate*, 782 F. Supp. at 225. In this case, none of the parties are United States citizens, nor are the securities issued by a United States corporation. And although "the United States courts have an interest in enforcing United States securities laws, this alone does not prohibit them from dismissing a securities action on the ground of forum non conveniens." *Allstate Life Insur. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1002 (2d Cir.), cert. denied, 510 U.S. 945, 126 L. Ed. 2d 334, 114 S. Ct. 386 (1993).

In fact, this case has little to do with New York or any other jurisdiction in the United States, except for the fortuitous presence of plaintiff's shareholder in Florida at the time of some of the purchases underlying this action. Rather, this case has a great deal to do with England: the trading was done with an account that was established in England at the London branch of defendant Paribas, a French bank; the trading was in securities issued by a Luxembourg company, managed by a Bahamian company, and solicited by a United Kingdom national who was employed by defendant Paribas. The United Kingdom has a substantial interest in

determining whether a British citizen who was employed by the London office of a French bank fraudulently induced the purchase of securities in London. In light of the foreign nature of this case and the fraud alleged, the English courts have a greater interest in adjudicating this case than the United States courts.

3. Familiarity with Law

In light of the forum selection clause and choice of law clause which designates English law as governing, an English court will have to decide a case brought by plaintiff under English law.

4. Other Factors

In light of the foreign nature of the transactions, the foreign plaintiff and the foreign defendant, this Court concludes that the case remaining before it is essentially foreign. The fact that the owner of the Panamanian corporation happened to be in Florida at the time of some of the purchases can not form the basis for local interest by United States courts, especially a court in the Southern District of New York. This Court is mindful that "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil*, 330 U.S. at 508. Thus, even giving plaintiff's choice some weight in the balance of factors, this Court concludes that because this forum is inconvenient to defendants out of all proportion to the convenience to the plaintiff, and because an adequate alternative forum exists for the adjudication of plaintiff's claims, dismissal of the case on the grounds of *forum non conveniens* is appropriate.

Conclusion

Because this Court lacks subject matter jurisdiction over plaintiff's claims, defendants' motion to dismiss on the grounds of lack of subject matter jurisdiction is hereby GRANTED. Even if subject matter jurisdiction were to be found, the Court would grant defendants' motion to dismiss on the grounds of *forum non conveniens*.

So ordered.

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

August 13, 1998

Mr. Nathan Lewin
Miller, Cassidy, Larroca & Lewin
2555 M Street, NW
Washington, D.C. 20037

Re: Europe and Overseas Commodity Traders
v. Banque Paribas London, et al.
Application No. A-136

Dear Mr. Lewin:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on August 13, 1998, extended the time to and including November 2, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

Supreme Court, U.S.
FILED
DEC 21 1998
OFFICE OF THE CLERK

No. 98-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A.,

Petitioner,

vs.

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should resolve a narrow and decreasing difference among the circuits regarding a non-exclusive test for subject matter jurisdiction in international securities fraud cases, even though the application of that test requires a fact-intensive inquiry and substantial alternative grounds exist for affirming the judgment below.

2. Whether this Court should review a determination that the district court lacked subject matter jurisdiction over a securities registration claim brought under sections 5 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77*e* and 77*l* (1998), where the lower court's ruling was restricted to the specific facts presented, the lower court did not purport to lay down a rule of general application, no other circuit has spoken on this issue, the ruling below did not conflict with this Court's decisions on the deference due to administrative agencies, and substantial alternative grounds exist for affirming the judgment below.

RULE 29.6 STATEMENT

Respondents respectfully refer the Court to the Rule 29.6 Statement set forth in their conditional cross-petition for writ of certiorari filed on December 4, 1998 (No. 98-923).

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Respondents Paribas (sued herein as Banque Paribas London), Paribas Global Bond Futures Fund (the "Fund"), Paribas Asset Management Ltd. ("PAM"), and John Arida respectfully submit this Brief in opposition to the Petition filed by Europe and Overseas Commodity Traders, S.A. ("EOC" or "Petitioner") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

STATEMENT OF THE CASE [2]

In October 1992, EOC entered into a non-discretionary investment agreement (the "Investment Agreement") with the London branch office of Paribas and opened an investment account with Paribas (the "London Investment Account"). P. App. 2a, 5a; Cross-P. App. 1a-39a. EOC is an alien corporation. The Investment Agreement, executed over a year before the investments at issue were made, states that EOC's country of incorporation is Panama and that its place of corporate registration is in Panama. P. App. 5a; Cross-P. App. 35a. EOC's address for correspondence, its principal place of business, the place where its directors' meetings are held, and the place where its shareholders' meetings are held, are all located in the Principality of Monaco. P. App. 5a, 32a & n.3; Cross-P. App. 35a, 37a. The Investment Agreement was executed on behalf of EOC by EOC directors Ian F. Ledger and Herbert W. Marvelly (P. App. 5a), residents of Monaco.

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1. EOC's Petition for a Writ of Certiorari will be cited as "Pet." The Appendix to EOC's Petition will be cited as "P. App." and the Appendix to Respondents' Conditional Cross-Petition for a Writ of Certiorari will be cited as "Cross-P. App." Emphasis in passages quoted herein is ours unless otherwise indicated.

2. Further details of the case may be found in section I of the Second Circuit's June 4, 1998 opinion (P. App. 4a-8a) and the "Background" section of the district court's June 28, 1996 opinion (P. App. 31a-36a).

The Investment Agreement states:

> This Agreement is governed by English Law. Disputes arising out of this Agreement shall be subject to the jurisdiction of the English courts to which for [Paribas'] benefit [EOC] submit[s].

Cross-P. App. 22a. In the Investment Agreement, EOC named an agent for service of process in England. P. App. 5a; Cross-P. App. 38a.

In October 1993, EOC began purchasing units of the Fund, a Luxembourg entity. P. App. 5a, 32a. The Fund's units are not traded on any U.S. exchange. P. App. 21a. EOC made its initial purchase of Fund units from its London Investment Account after a discussion in England between Alan Carr (a Canadian citizen who owns EOC's shares) and Mr. Arida (a U.K. national employed by Paribas in its London office). Pet. 3-5; P. App. 2a, 33a-35a, 41a.

EOC made later purchases from its London Investment Account, pursuant to directions given by Mr. Carr while Mr. Carr was visiting Florida. P. App. 7a, 20a n.12, 41a-42a.[3] Petitioner's contention that it was induced to make purchases of securities "from Florida" (Pet. 5) is incorrect: as the district court recognized, "each time . . . the actual purchase was made

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3. Petitioner suggests that "a buyer in the United States" was "target[ed]." Pet. 3. However, the buyer — EOC, a Panamanian corporation with a principal place of business in Monaco — was not "in the United States." *Cf.* P. App. 17a n.8 (Oakes, J., noted that "[h]aving chosen to do business through an offshore corporation to avoid taxes and other regulatory burdens, Carr cannot now claim to be an alter ego of EOC"). In addition, EOC was first identified as a customer in England, where Mr. Arida first spoke to Mr. Carr about the Fund. P. App. 33a, 35a.

in London, as the funds used to pay for the shares were debited from plaintiff's trading account with Paribas." P. App. 41a-42a. During a six-week period from October through November 1993, EOC used funds from its London Investment Account to purchase approximately $1,788,800 worth of Fund units. Pet. 5; P. App. 33a, 36a, 39a, 41a-42a, 51a.[4]

While in Florida, Mr. Carr told one of his acquaintances, Matthew O'Brien, about the Fund. P. App. 7a. Petitioner's claim that "*respondents solicited* and sold securities to Mr. O'Brien" (Pet. 6) is thus incorrect. Mr. O'Brien did not submit any evidence below; the information relied upon by EOC is hearsay from Mr. Carr's affidavit. P. App. 7a. Paribas submitted Mr. O'Brien's written application to purchase Fund units, in which Mr. O'Brien stated that he was a British national with a London address and telephone number. P. App. 7a-8a.

After the Fund's units decreased in value, EOC sued Paribas, the Fund, Mr. Arida individually, and PAM (a Bahamian corporation that manages the Fund, P. App. 2a) in the Southern District of New York, asserting claims under the federal securities laws, Florida Blue Sky laws, and Florida common law. Respondents moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction over the Fund, Mr. Arida and PAM, and *forum non conveniens*.[5]

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4. Petitioner implies that Mr. Arida initiated all the contacts with Mr. Carr while Mr. Carr was in Florida (Pet. 5). That is not correct: some of the contacts were initiated by Mr. Carr. *See* P. App. 5a ("The parties agree that each party initiated at least some of these calls."). Furthermore, as the district court found, the first order for units of the Fund in response to Respondents' alleged misrepresentations occurred while Mr. Carr was in England, not the United States. P. App. 35a ("Plaintiff's initial purchase of shares in the Fund was made in England on October 8, 1993.").

5. The district court directed Respondents not to move for dismissal under Federal Rule of Civil Procedure 12(b)(6). *See* P. App. 3a. Thus, (Cont'd)

The district court dismissed EOC's complaint in a decision issued June 19, 1996 and amended in minor respects on June 28, 1996. Pet. App. 30a-31a. The district court held that (i) it lacked subject matter jurisdiction of plaintiff's securities law claims; (ii) it lacked personal jurisdiction over the Fund, PAM, and Mr. Arida; and (iii) even if jurisdiction were present, the complaint should be dismissed based on *forum non conveniens*. P. App. 37a-53a.

The United States Court of Appeals for the Second Circuit unanimously affirmed the district court on June 4, 1998, holding that the district court had properly found that it lacked subject matter jurisdiction. Pet. App. 29a. The court of appeals did not reach the *forum non conveniens* issue.

SUMMARY OF ARGUMENT

A writ of certiorari should not be granted.

First, this case involves a rare fact pattern — one that is unlikely to recur. The parties' dispute is of no significance to the public at large.

Second, the difference among the circuits regarding application of the test for subject matter jurisdiction in international securities fraud cases is narrow and appears to be decreasing. The accepted standards all involve a fact-intensive inquiry. Here, the facts would not support a finding of subject matter jurisdiction even if this Court were to adopt the allegedly more liberal standards for jurisdiction in the Third, Eighth, and Ninth Circuits.

(Cont'd)
whether the complaint states a claim has not yet been tested and is not in issue.

Third, this is the first case to decide the standard for subject matter jurisdiction under section 12 of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77*l*, over registration claims arising from foreign transactions. There is no conflict among the circuits on this issue of first impression. Further, the Second Circuit's analysis of Regulation S, 17 C.F.R. §§ 230.901-230.904 (1998), was dictum. The court of appeals expressly stated that it was not "attempt[ing] . . . to provide a set of definitive rules to govern future transactions." P. App. 18a.

Fourth, the Second Circuit's decision does not conflict with this Court's rulings on the deference due to administrative agencies.

Fifth, the questions on which Petitioner seeks review are academic: even if this Court resolved both issues in Petitioner's favor, the complaint would still be dismissable based on *forum non conveniens* and other grounds.

Finally, the district court's decision and its unanimous affirmance by the Second Circuit were both substantively correct.

REASONS FOR DENYING THE WRIT

I.

THE FACTS IN THIS CASE ARE UNLIKELY TO RECUR

This case does not merit review by this Court because the fact pattern involved is unlikely to recur. This case involved the sale of units in a Luxembourg fund by the London branch of a French bank to a Panamanian corporation with its principal place of business in Monaco. The fact that the owner of the

corporation — a Canadian citizen — happened to be temporarily in Florida when certain misrepresentations allegedly were made to him was, in the words of the courts below, "entirely fortuitous and personal" (P. App. 17a; *see also id.* at 28a) and "pure happenstance" (P. App. 43a).

Certiorari is inappropriate if a question is "of importance merely to the litigants and [does] not present an issue of immediate public significance." *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 n.2 (1955).[6] It is unlikely that courts will be called upon with any frequency in the future to decide whether statements made to "a transient foreign national in the United States" (P. App. 23a; *see also id.* at 20a n.12) give rise to subject matter jurisdiction under the federal securities laws. Indeed, this is the first such case to be reported since the securities laws were enacted in 1933.

II.

THE ALLEGED DIVISION AMONG THE CIRCUITS ON SUBJECT MATTER JURISDICTION IN SECURITIES FRAUD CASES DOES NOT WARRANT REVIEW

A. The Difference Among the Circuits Regarding the Conduct Test Is Narrow and the Circuits' Standards Are Converging

For nearly 30 years, federal courts have used two tests to determine whether subject matter jurisdiction exists over federal

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6. *Accord Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (certiorari should be granted "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"); Robert L. Stern *et al.*, *Supreme Court Practice* 169, 170-71 (7th ed. 1993) (certiorari sometimes denied even if circuit split exists "where the impact of the conflict is narrowly confined and not apt to have continuing future consequences").

securities claims arising from international transactions: the "effects" and "conduct" tests. Both tests originated in the Second Circuit. *See* James J. Finnerty III, *The "Mother Court" and the Foreign Plaintiff: Does Rule 10b-5 Reach Far Enough?*, 61 Fordham L. Rev. S287, S289 (1993) ("The Second Circuit has been the pioneer in establishing the parameters of the federal courts' subject matter jurisdiction over transnational securities fraud."); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 205-06 (2d Cir.) (effects test), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 992-93 (2d Cir.) (conduct test), *cert. denied*, 423 U.S. 1018 (1975). More recently, the Second Circuit has held that the two tests can be combined, *see Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996), liberalizing the standard used for determining whether jurisdiction exists.[7]

Not surprisingly, the Second Circuit — "the 'Mother Court' of securities law"[8] — has produced a steady stream of decisions

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7. *Accord* Mark B. Schwartz, *Itoba, Ltd. v. Lep Group PLC: An Apple That Fell from the Wrong Branch*, 22 Brook. J. Int'l L. 467, 469 (1996) (*Itoba* "expands the subject matter jurisdiction of U.S. courts over foreign securities transactions and increases the extraterritorial application of U.S. securities laws"); Joseph P. Garland & Brian P. Murray, *Subject Matter Jurisdiction Under the Federal Securities Laws: The State of Affairs After Itoba*, 20 Md. J. Int'l L. & Trade 235, 256 (1996) (*Itoba* evidences "more flexible" approach where subject matter jurisdiction may be found even "where the facts do not support one or the other of the [conduct or effects] tests"); Michael W. Gordon, *United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation*, 10 Fla. J. Int'l L. 487, 532 (1996) (less than sufficient conduct and less than sufficient effects may still "add up to jurisdiction" under *Itoba*); Dennis R. Dumas, *United States Antifraud Jurisdiction Over Transnational Securities Transactions: Merger of the Conduct and Effects Tests*, 16 U. Pa. J. Int'l Bus. L. 721, 722 (1995) (similar).

8. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting); *accord Zoelsch v. Arthur Andersen & Co.*, 824

(Cont'd)

interpreting the conduct and effects tests. *See, e.g.*, Finnerty, *supra*, at S289 n.15 & S290 n.16 (listing cases). In contrast, the circuits that Petitioner claims conflict with the Second Circuit — the Third, Eighth, and Ninth Circuits — have produced only sporadic decisions on the extraterritorial application of the securities laws. Indeed, the Third Circuit has not dealt with this issue since *Kasser*, more than twenty years ago. The Eighth Circuit's decision in *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979), is almost as old. No court of appeals or district court case within the Eighth Circuit has followed *Continental Grain* in determining the extraterritorial application of federal securities laws.

Rather than being an actual conflict among the circuits, then, the perceived division in the law may simply reflect a lack of opportunity for courts outside the Second Circuit to consider later developments in the law, such as the broad combined conduct and effects test laid down by the Second Circuit in *Itoba*. *See generally* Stern, *supra*, at 172 (conflict created by old case provides less reason for grant of certiorari).

Moreover, the circuit split is quite narrow, even as described by Petitioner. All federal courts, along with the Restatement (Third) of the Foreign Relations Law of the United States (1987) (the "Restatement"), have accepted the conduct and effects tests.[9] The federal appellate courts differ at most

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F.2d 27, 32 (D.C. Cir. 1987) (noting "the Second Circuit's preeminence in the field of securities law"); *SEC v. Kasser*, 548 F.2d 109, 115 (3d Cir. 1977) (calling the Second Circuit "a court with especial expertise in matters pertaining to securities").

9. The Restatement's "reasonableness" inquiry, which was followed by the court below (P. App. 23a-24a), has been cited favorably by Justice Scalia. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818-19 (1993) (dissent).

only over what quantum of conduct is required to satisfy the conduct test, or how closely that conduct must be related to the alleged fraud or injury. Neither the effects test nor the combined *Itoba* test was implicated in the cases that Petitioner cites as evidence of a supposed circuit split.[10] With respect to the conduct test, the position of the Third, Eighth, and Ninth Circuits does not differ radically from that of the Second, Fifth, Seventh, and D.C. Circuits, and any difference between the jurisdictional standards adopted by the Second and Ninth Circuits appears to be decreasing, as shown below:

Third Circuit. Although the Third Circuit stated in 1977 that the federal securities laws "grant jurisdiction in transnational securities cases where *at least some activity designed to further a fraudulent scheme* occurs within this country," *Kasser*, 548 F.2d at 114, it also took the Second Circuit's standards into account. The Third Circuit discussed *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) and *Bersch*

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10. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998) ("This case . . . affords us no occasion to explore [the effects] approach."); *Robinson v. TCI/US West Cable Communications, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) ("As Robinson does not argue that jurisdiction is predicated on adverse effects, . . . we need concern ourselves only with the conduct test."); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 421-22 (9th Cir. 1983) ("The question presented . . . is whether the district court has subject matter jurisdiction under the federal securities laws over a transaction in foreign securities between foreign corporations and citizens of foreign states where the only connection between the transaction and the United States is that some of the allegedly fraudulent conduct took place here and that instrumentalities of interstate commerce were used to effect the fraud."); *Continental Grain*, 592 F.2d at 417 (devoting little more than a paragraph to the effects test and finding that it was not met); *Kasser*, 548 F.2d at 112 ("it is questionable whether any effect in the United States was wrought by the alleged fraudulent activities of the defendant. The SEC really does not claim that there was any such effect.").

as the "leading opinions" on jurisdiction in international securities fraud cases. Quoting *IIT*, the Third Circuit noted that "the conduct of the defendants here *cannot be deemed to be* '*mere[ly] preparatory*' to fraudulent acts committed outside this country." *Kasser*, 548 F.2d at 115. Quoting *Bersch*, the Third Circuit observed that the defendants' acts within the United States "directly cause[d]" the plaintiff's losses. *Id.*

On the facts of *Kasser*, the Second Circuit could well have reached the same result as the Third Circuit.[11] For example, the defendants — including Kasser, a U.S. citizen — allegedly made misrepresentations that induced the plaintiff to invest $45 million over several years in two corporations (one of which was formed under U.S. laws) having offices in United States. 548 F.2d at 111; *see SEC v. Kasser*, 391 F. Supp. 1167, 1169 (D. N.J. 1975), *rev'd*, 548 F.2d 109 (3d Cir. 1977). Bank accounts in the United States were used to effectuate the fraud. 548 F.2d at 111. One of the investment contracts at issue was executed in the United States, and documents executed elsewhere were drafted in this country. *Id.* The more expansive language employed by the Third Circuit thus was not essential to its ultimate decision.

Eighth Circuit. In *Continental Grain*, decided in 1979, the Eighth Circuit relied upon both *Kasser* and cases from the Second Circuit:

> we examine . . . whether defendants' conduct in the United States was significant with respect to the alleged violation and whether it furthered the fraudulent scheme. The conduct in the United States cannot be "merely preparatory" and must be material, that is, "directly cause the losses."

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11. The Second Circuit has consistently held that U.S. conduct "merely preparatory" to securities fraud abroad will not implicate our antifraud laws. *See* P. App. 22a and cases there cited.

592 F.2d at 420 (quoting *Kasser*, *IIT* and *Bersch*). In a later decision, the Eighth Circuit specifically noted that "*Continental Grain* . . . concluded the acts in the United States must be 'significant' in order to provide a jurisdictional basis." *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1384 (8th Cir. 1993). This is hardly a departure from the Second Circuit standard.[12] Indeed, the *Continental Grain* court stated:

> *Like the Second Circuit*, we are reluctant to conclude that Congress would have intended the securities laws to have a global reach when the domestic conduct is insubstantial or the domestic impact is too generalized or insignificant.

592 F.2d at 421. *Continental Grain* presented U.S. contacts that were more than sufficient to support an assertion of subject matter jurisdiction under any test: the plaintiff was the wholly-owned subsidiary of a U.S. corporation (*id.* at 411), the defendants were U.S. citizens (*id.*), and "the fraudulent scheme of nondisclosure was devised and completed in the United States" (*id.* at 420).

Ninth Circuit. In *Grunenthal*, the Ninth Circuit adopted the approach described in *Continental Grain*. 712 F.2d at 424, 425. The Ninth Circuit was careful to state that its decision was "not inconsistent with the approach taken by the Second Circuit," *id.* at 426, and it quoted Second Circuit cases requiring that the acts within the United States directly cause the plaintiffs' loss, involve more than "mere preparatory activities" in the United States, and include "substantial misrepresentations" in the United States. *Id.*

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12. *See* Gordon, *supra*, at 524 ("This hardly seems a diversion from the Second Circuit's repeated views on what constitutes conduct. It is more an adoption of those views."; noting that *Continental Grain* "essentially follow[s] the conduct test views established in the Second Circuit") (article cited by Petitioner).

A more recent Ninth Circuit decision involving the extraterritorial application of the securities fraud laws, *Butte Mining PLC v. Smith*, 76 F.3d 287 (9th Cir. 1996), appears to bring the Ninth Circuit closer to the Second Circuit. *See* Gordon, *supra*, at 493, 532 (article cited by Petitioner). In *Butte Mining*, the Ninth Circuit, "recogniz[ing] that conduct that is 'merely preparatory' to a fraud is not a basis for jurisdiction of the fraud to be vested in a court of the United States," 76 F.3d at 291, affirmed the district court's dismissal of the complaint. The court of appeals noted that the U.S. securities laws

> are not to be invoked unless substantial steps in the perpetuation of the fraud were taken here or the criminal conduct engaged in affected our securities markets or American investors.

Id. Similarly, in the case at bar, the district court found that

> [t]he communications made while Carr was in Florida were only ancillary to the initial fraud in London and therefore can not be said to have directly caused plaintiff's loss. . . . In the instant case, the United States was never used or intended to be used as a base for manufacturing fraudulent securities for export.

P. App. 42a.

As the Ninth Circuit has narrowed its view of subject matter jurisdiction, the Second Circuit's view has become more expansive. The Second Circuit's decision in *Itoba*, which combines the conduct and effects tests, broadens the scope of extraterritorial subject matter jurisdiction by permitting courts to consider every possible U.S. contact, whether those contacts fall under the rubric of "conduct" or "effects." *See generally* Schwartz, *supra*.

In sum, this case does not present "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler*, 261 U.S. at 392-93 (dismissing writ of certiorari as improvidently granted when Supreme Court determined that the circuits "were really in harmony and not in conflict"); *see also Rice*, 349 U.S. at 79 n.2 (petitions for certiorari should not be granted if alleged conflict "turn[s] out to be illusory"); Stern, *supra*, at 167 ("there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized"). The narrow gradations among the circuits' decisions applying the conduct test do not warrant this Court's review.

Even under the standard urged by Petitioner, the conduct here falls far short of that necessary to support subject matter jurisdiction. The transactions at issue involved neither U.S. investors nor U.S. markets. They were executed in Europe, among non-U.S. persons, as part of a course of dealing that originated in London. On these facts, fine-tuning the applicable legal standard would have no practical effect. As this Court stated in dismissing a writ of certiorari as improvidently granted:

> A federal question raised by a petition may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice, 349 U.S. at 74 (citations omitted).

B. The Analysis Conducted Below Was Fact-Specific

When faced with a predominantly foreign securities transaction, federal courts endeavor to

> determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [the predominantly foreign transaction] rather than leave the problem to foreign countries.

Bersch, 519 F.2d at 985; *accord, e.g., Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991); *Psimenos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041, 1045 (2d Cir. 1983); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 9 (2d Cir. 1979); *Allen v. Lloyd's of London*, 94 F.3d 923, 929 (4th Cir. 1996); *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170, 176 (5th Cir. 1990); *Zoelsch*, 824 F.2d at 32. The issue of the amount of U.S.-based conduct and/or the relationship between the U.S. conduct and the alleged injury that is necessary to create subject matter jurisdiction thus involves a case-by-case, fact-specific analysis. *See, e.g., Continental Grain*, 592 F.2d at 414 ("A finding of jurisdiction will depend upon the analysis of the particular facts in any given case."). However, the Supreme Court "do[es] not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

C. The Facts Below Would Not Support Subject Matter Jurisdiction Under the Test Used by Any Circuit

However the test for subject matter jurisdiction is articulated, the facts developed below do not meet it. The securities in question were not registered, listed or traded on any U.S. exchange. P. App. 38a. The Fund is a foreign

investment entity with no U.S. business or investors. *Id.* at 38a-39a. EOC is a Panamanian corporation with a principal place of business in Monaco, and suffered no loss in the United States. *Id.* at 39a. As the Second Circuit observed:

> In the past, we have found jurisdiction over a predominantly foreign securities transaction under the conduct test when, in addition to communications with or meetings in the United States, there has also been a transaction on a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress. *All of these factors are absent from EOC's allegations.*

Id. at 24a-25a (footnote omitted).

The facts alleged by EOC, in sum, present the Court with "no U.S. party to protect or punish." *Id.* at 26a. Under those circumstances, the reach of the U.S. securities laws cannot and should not be expanded to include the transaction at issue. *Id.* at 28a (fortuitous presence of EOC's sole shareholder in Florida "did not bring this otherwise entirely foreign transaction within the antifraud provisions of U.S. securities law").

III.

THE REASONS ADVANCED BY PETITIONER FOR GRANTING CERTIORARI ON THE SECURITIES FRAUD ISSUE ARE NOT PERSUASIVE

Petitioner depicts a parade of horribles that supposedly will occur if this Court does not grant certiorari. Pet. 14-15. However, the problems envisioned by Petitioner are makeweight.

First, it is unlikely that forum shopping (Pet. 14) will occur on a grand scale due to the asserted differences in the standards

for subject matter jurisdiction. To date, international securities litigation — including EOC's own complaint — continues to be filed within the Second Circuit, notwithstanding its allegedly stricter jurisdictional standards. Further attempts to forum-shop can be controlled through transfers for the convenience of parties and witnesses pursuant to 28 U.S.C. § 1404(a) (1998).

Second, the court of appeals' decision does not deprive Americans located abroad of the protection of foreign laws. An American in a situation analogous to Petitioner's would not *expect* to be protected by foreign law. If an American traveling abroad purchased U.S. listed securities from a U.S. broker, paid for those securities from an American bank account, and chose U.S. law to govern this transaction, he or she would expect the transaction to be governed by American — not foreign — law. Similarly, foreign nationals "*temporarily* in this country" (Pet. 15) should not expect U.S. law to apply to purchases of foreign securities traded only on foreign markets from foreign sellers, especially if (as here) they have in advance entered into an agreement selecting foreign law and a foreign forum. Cross-P. App. 22a.[13]

IV.

THE SECOND CIRCUIT'S STATEMENTS IN THIS CASE ABOUT SUBJECT MATTER JURISDICTION UNDER THE 1933 ACT DO NOT WARRANT REVIEW

A. The Second Circuit's Statements About Regulation S Were Dicta

Regulation S creates two safe harbor exemptions from registration. *See* 17 C.F.R. § 230.903. Those safe harbors are

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13. The Investment Agreement is governed by English law. Cross-P. App. 22a. Respondents demonstrated below, without dispute, that the Investment Agreement's forum selection clause ("Disputes arising out of this Agreement *shall* be subject to the jurisdiction of the English courts . . . ," *id.*) is, under English law, construed as electing an exclusive forum. *Id.* at 44a-45a.

non-exclusive. As the Second Circuit recognized, "[a] transaction not within either of the safe harbors may still be outside of the United States within the meaning of 17 C.F.R. § 230.901." P. App. 13a; *see also* Securities Act Rel. No. 6863, [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,524 at 80663-64 (Apr. 24, 1990) (hereinafter the "1990 Release") ("[t]he safe harbors are not exclusive and are not intended to create a presumption that any transaction failing to meet their terms is subject to [the registration requirement]").

The Second Circuit found that "the purchases by EOC ordered by Carr were such foreign transactions" — that is, they did not fall within either of the safe harbors, yet still remained outside the subject matter jurisdiction of U.S. courts. *Id.* The Second Circuit then applied the familiar conduct and effects tests in a way similar to that set forth in the Restatement §§ 403, 416(2), without resort to Regulation S. P. App. 13a-17a. Thus, the Second Circuit's comments on Regulation S and its two safe harbors were dicta, and do not warrant Supreme Court review. *See California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.' "); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (similar).

B. The Second Circuit Did Not Lay Down a Rule of General Application

The Second Circuit's holding regarding subject matter jurisdiction under the 1933 Act was narrow: "we hold that *the securities sold to EOC* did not fall under the registration requirements of the 1933 Act, and that we therefore lack subject matter jurisdiction over EOC's § 5 claims." P. App. 17a. The Second Circuit continued:

> Of course, *we do not attempt in ruling on this case to provide a set of definitive rules to govern future*

> *transactions*. Nor do we mean to suggest that standards developed under the anti-fraud provisions [of the federal securities laws] may be incorporated wholesale into the registration context. The exact contours of the conduct and effects test, as applied to registration cases, must remain to be defined on a case-by-case basis.

P. App. 18a. Thus, the Second Circuit did not purport to set forth definitive standards that would govern future transactions. Supreme Court review at this point would be premature, and instead should await the anticipated development of the governing standard by the courts of appeals.

V.

SINCE THIS IS THE ONLY DECISION ON THE ISSUE OF EXTRATERRITORIAL SUBJECT MATTER JURISDICTION OVER REGISTRATION CLAIMS, THE ISSUE IS NOT RIPE FOR REVIEW

The Second Circuit's decision on subject matter jurisdiction over extraterritorial registration claims under the 1933 Act is one of first impression. *See* P. App. 14a ("we work on an essentially blank slate"). Instead of granting review in this case, the Court — in accordance with its usual practice — should allow various lower courts to develop the law in this field. As Justice Stevens noted in a case where the Court denied certiorari:

> [F]urther consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. . . . [I]t is a

> sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.

McCray v. New York, 461 U.S. 961, 962-63 (1983); *see also* Stern, *supra*, at 171 (quoting Justice Brennan as saying that "there is . . . a policy of letting tolerable conflicts go unaddressed until more than two courts of appeal have considered a question" and Justice Stevens as saying that "experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved").

VI.

THE SECOND CIRCUIT'S DECISION ON SUBJECT MATTER JURISDICTION UNDER SECTION 12 OF THE 1933 ACT DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

Contrary to Petitioner's contention (Pet. 16, 17), the Second Circuit's decision on subject matter jurisdiction under the 1933 Act does not conflict with Supreme Court precedent regarding deference to administrative agencies. The rationales that have traditionally supported judicial deference to agencies are inapplicable to the decision below.

A. The SEC Is Not Entitled to Deference on Issues of Judicial Subject Matter Jurisdiction

While courts should defer to the SEC when that agency determines whether someone has qualified for a safe harbor under Regulation S, the agency's expertise does not extend to telling a federal court that it has subject matter jurisdiction over a civil lawsuit against a foreign citizen.

First, the principal rationale for extending deference to a governmental agency's views is that an agency has expertise in a specialized area, such as environmental protection[14] or Medicare regulations,[15] and Congress has entrusted particular statutes in that area to the agency for administration.

That is not true, however, of the limits on subject matter jurisdiction under the federal securities laws. Those limits were constructed by courts, with the express purpose of conserving judicial resources in accordance with Congress' presumed intent. *See, e.g., Itoba*, 54 F.3d at 121 (test is whether Congress would have wished to devote " the precious resources of United States courts" to transnational transaction at issue); *Allen*, 94 F.3d at 929 (similar); *Zoelsch*, 824 F.2d at 32 ("Courts have . . . been concerned to preserve American judicial resources for the adjudication of domestic disputes and the enforcement of domestic law. . . . It is far from clear that these resources would be well spent on all the potential disputes in which domestic conduct makes a relatively small contribution to securities fraud that occurs elsewhere.") (citations omitted); *Bersch*, 519 F.2d at 985.

Second, it is not the function of agencies such as the SEC to determine whether a federal court has jurisdiction over a private civil action. To the contrary, when legislative mandates are unclear, it is the judiciary's function to determine its own subject matter jurisdiction.[16] Of course, the courts'

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14. *E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

15. *E.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994).

16. *See generally United States v. Nixon*, 418 U.S. 683, 704 (1974) ("Notwithstanding the deference each branch much accord the others,

(Cont'd)

determination of judicial jurisdiction does not prevent the SEC from using its resources as it pleases in administrative proceedings.

Third, Regulation S does not purport to be a jurisdictional test. Rather, it creates two "non-exclusive safe harbors" within which the SEC will not require registration. 1990 Release at 80666; *accord id.* at 80663-64. Although an initial determination by the SEC that certain conduct qualifies for a safe harbor exemption would be entitled to deference, courts need not defer to the SEC when a private plaintiff attempts to use this regulation for a purpose for which it was not intended. *Cf. New York Shipping Ass'n v. Federal Maritime Comm'n*, 854 F.2d 1338, 1363 (D.C. Cir. 1988) ("Judicial deference is required under *Chevron* when Congress has not spoken clearly to *the precise question the agency must consider in the course of its administration of that statute*.").

(Cont'd)
the 'judicial Power of the United States' vested in the federal courts by Article III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . ."); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Midland Coal Co. v. Director, Office of Worker's Compensation Programs*, 149 F.3d 558, 561 (7th Cir. 1998) ("We are required to satisfy ourselves of our own jurisdiction. . . . 'While we ordinarily give great weight to the interpretation of the agency charged with enforcement of the statute we are construing, that deference does not extend to the question of judicial review, a matter within the peculiar expertise of the courts.' ") (citations omitted).

B. The Interpretation of Regulation S Advanced in the SEC's Amicus Brief Below Conflicts with the SEC's Earlier Expressed Views and Therefore Is Not Entitled to Deference

"An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.' " *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citations omitted). That is precisely the situation here.

The interpretation of Regulation S advocated in the SEC's *amicus curiae* brief to the Second Circuit conflicts with the agency's previous position on the extraterritorial reach of the 1933 Act, which the SEC articulated in the releases issued as part of its formal rulemaking process. The SEC has "traditionally taken the position that the registration requirements of section 5 of the [1933] Act are primarily intended to protect *American investors*." Registration of Foreign Offerings by Domestic Issuers, Securities Act Release No. 4708 (July 9, 1964), 29 Fed. Reg. 9828, 9828; *see* 1990 Release at 80,665 (the "registration of securities is intended to protect the U.S. capital markets and investors purchasing in the U.S. markets"). Petitioner is not an American investor, but rather is a Panamanian corporation with its principal place of business in Monaco. P. App. 2a, 32a. Even if one were to pierce the corporate veil for Mr. Carr's benefit,[17] the investor would still

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17. In fact, such piercing should not be permitted. *See, e.g., Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946) ("While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages."); *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) ("we will not here 'pierce

(Cont'd)

be a Canadian citizen who happened to be in Florida for "entirely fortuitous and personal" reasons (P. App. 17a; *see also id.* at 28a, 43a). Thus, the Second Circuit's decision is wholly consistent with the SEC's previously articulated policy.

Further, the SEC has recognized that the "registration of offerings with only incidental jurisdictional contacts should not be required," and has instructed that

> principles of comity and the reasonable expectations of participants in the global markets justify reliance on laws applicable in jurisdictions outside the United States to define requirements for transactions effected offshore.

1990 Release at 80664-65. Here, the purchaser was a foreigner, the purchased securities were those of a Luxembourg entity, and they were paid for from a London account. P. App. 2a, 5a, 41a-42a. By arguing that the subject matter jurisdiction of U.S. courts should be expanded to reach this situation, the SEC is adopting a position contrary to its earlier declaration that Regulation S is intended to protect American investors and American capital markets. Therefore, the SEC's amicus brief is not entitled to deference.

(Cont'd)

the corporate veil' in favor of those who created that veil"); P. App. 17a n.8 ("the author of this opinion would add that: 'Having chosen to do business through an offshore corporation to avoid taxes and other regulatory burdens, Carr cannot now claim to be an alter ego of EOC.' ").

VII.

RESOLUTION OF THE QUESTIONS PRESENTED BY PETITIONER WOULD NOT DETERMINE THE CASE

In addition to dismissing the complaint for lack of subject matter jurisdiction, the district court also found that it lacked personal jurisdiction over the Fund, PAM, and Mr. Arida, and that dismissal of the claims were in any event warranted by the doctrine of *forum non conveniens*. P. App. 43a-44a. A district court's decision on *forum non conveniens* is reviewed for abuse of discretion. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . . ."). As is set forth in more detail in Respondents' Conditional Cross-Petition for a Writ of Certiorari, the district court did not abuse its discretion because it reviewed the factors set forth in *Gulf Oil Corp. v. Gilbert Storage & Transfer Co.*, 330 U.S. 501 (1947), and applied the *forum non conveniens* doctrine in a manner that was supported by the evidence. P. App. 43a-52a.

Thus, even if this Court reversed the Second Circuit's decision on subject matter jurisdiction, the Court's decision could well be irrelevant as a practical matter, because Respondents would be entitled to dismissal on other grounds.[18]

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18. The law review article cited by Petitioner advocates the use of the doctrine of *forum non conveniens* to resolve the tensions created by the application of U.S. securities laws to transnational transactions. Finnerty, *supra*, at S291, S316-20. Dismissal on *forum non conveniens* grounds is especially appropriate here because the parties chose English law and an English forum to govern their dealings. Every circuit to consider the issue to date has held that forum selection and choice-of-law clauses are enforceable in cases involving the federal securities laws. (Cont'd)

Furthermore, even if the district court's rulings on personal jurisdiction and *forum non conveniens* were overturned, Respondents would still have the right to move for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(h).

Because dismissal of the complaint based on *forum non conveniens* or other grounds would render this Court's decision on subject matter jurisdiction academic, this is not an appropriate case in which to grant certiorari. *See Rice*, 349 U.S. at 74 ("this Court does not sit to satisfy a scholarly interest in [intellectually interesting] issues"); Stern, *supra*, at 173. Even if the Second Circuit's opinion on subject matter jurisdiction were erroneous, that alone would not warrant review by this Court. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); Stern, *supra*, at 193 (quoting Chief Justice Vinson and Justice Harlan to the effect that the Court will not grant certiorari simply because decision below was wrongly decided).

(Cont'd)

See Richards v. Lloyd's of London, 135 F.3d 1289, 1293-94 (9th Cir.), *cert. denied*, 119 S. Ct. 365 (1998); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1294-95 (11th Cir. 1998); *Haynsworth v. The Corporation*, 121 F.3d 956, 970 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1513 (1998); *Allen*, 94 F.3d at 929; *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1363-65 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992).

VIII.

THE JUDGMENT BELOW WAS CORRECT

The Second Circuit's decisions on subject matter jurisdiction over EOC's international securities fraud and failure-to-register claims were correct.

First, the Second Circuit's approach to the conduct test is consistent with this Court's precedent in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (unless affirmative intention of Congress is clearly expressed, court presumes legislation is intended to apply only within the territory of the United States), unlike the expansive approach urged by Petitioner. The approach followed by the court below also minimizes the burdens on U.S. courts and the potential conflicts with foreign states.

Second, for transnational failure-to-register claims, it makes sense to adapt the familiar and well-developed conduct and effects standards for subject matter jurisdiction. The approach advocated in the SEC's amicus brief to the Second Circuit — that, absent an exemption, the registration provisions of the 1933 Act apply even to solicitations made by telephone from abroad to transient visitors as they pass through the United States (Pet. 16-17) — would turn the federal courts into fora for disputes concerning every securities transaction that ever touched the United States, without regard to the level of U.S. conduct or effects, and with concomitant potential for conflict with other countries' regulatory systems.

Finally, as a factual matter, the district court and the court of appeals correctly decided that the tangential U.S. contacts in this case did not justify the expenditure of U.S. resources. When so many factors point to Europe rather than the United

States, and when the parties have voluntarily selected a foreign forum and foreign law, federal courts have no cause to exercise subject matter jurisdiction.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-723

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A.,

Petitioner,

v.

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondents acknowledge that the principal legal issue presented by the petition is the subject of conflicting decisions in six Circuits – with three Circuits lining up on one side and three on the other. The respondents even vividly described this conflict in their brief below, when they told the Second Circuit that "[o]ther Circuits, *disagreeing with this Court*, have adopted a version of the conduct test that is more permissive (although not so permissive as the SEC's)." Defendant-Appellees' Brief in Response to Brief of the SEC, pp. 9-10.

Seeking to evade consideration of the contentious legal issue by this Court, the respondents assert here that the conflict is "narrow" and that the "Circuits' standards are converging" (Br. in Opp. 6). This would be news to the Seventh Circuit, whose recent description of the conflict (quoted *in extenso* at pp. 10-11 of our petition) views the disagreement as a "spectrum" with widely different "extremes." See *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 666 (7th Cir. 1998).

The respondents also declare that the facts of this case would have resulted in dismissal of the complaint even in the Third, Eighth and Ninth Circuits. See Br. in Opp. 13, 14-15. The SEC plainly did not agree with that conclusion. The SEC's brief in the court of appeals – which we reproduce as Appendix A to this Reply – urged the Second Circuit to find that there *is* jurisdiction on these facts in an American federal district court. Indeed, even the opinion of the court below recognized that this case involves "activity" in the United States that "directly cause[d] the harm to the foreign interest, which has in the past been the key element of litigation involving the conduct test." Pet. App. 22a.

The decision of the Second Circuit in this case, rather than demonstrating a "convergence" with the standards of other courts of appeals, manifested a widening gap between the standards for jurisdiction applicable in the Second Circuit and the standards applied in the Third, Eighth and Ninth Circuits. The Second Circuit *added* a precondition for jurisdiction that it had not explicitly prescribed previously – *i.e.*, that a "relevant interest of the United States was implicated" by the allegedly fraudulent conduct. See Pet. App. 23a. Because it found no such "relevant interest," the Second Circuit refused to authorize jurisdiction even though "a misrepresentation is made in the United States and reliance occurs on U.S. soil." Pet. App. 27a. This is squarely contrary to the decision reached by the Ninth Circuit in *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983).

In the *Grunenthal* case a German corporation purchased securities in a Mexican corporation controlled by a Swiss citizen and a Mexican citizen through several Bahamian trusts. 712 F.2d at 422. The only conduct in the United States was a meeting that had taken place in Los Angeles, where the sales agreement was executed and misrepresentations first made abroad were repeated. 712 F.2d at 423. The Ninth Circuit recognized that, as was arguably true here, "the allegedly fraudulent conduct occurred in this country by happenstance" (712 F.2d at 425), but it nonetheless held that there was subject-matter jurisdiction under Section 10(b).*

Finally, the respondents mischaracterize our contention that the Second Circuit's cavalier rejection of Regulation S warrants review of the second issue presented in our petition. We did *not* claim that the SEC is entitled to deference on the question of whether a federal district court has jurisdiction over a particular securities claim. See Br. in Opp. 19-20. Our contention is that the SEC's judgment regarding when, under the Securities Acts, a security must be registered – the subject of Regulation S – is entitled to deference. Even if that judgment impacts upon the reach of the agency's jurisdiction, the agency's conclusion is entitled to deference from the courts. See *Reiter v. Cooper*, 507 U.S. 258, 269 (1993); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986); *Fleischmann v. Director*, 137 F.3d 131, 136 n.2 (2d Cir. 1998), *cert. denied sub*

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* Contrary to the respondents' representations (see Br. in Opp. 12), the Ninth Circuit did not overrule or narrow *Grunenthal* in *Butte Mining PLC v. Smith*, 76 F.3d 287 (9th Cir. 1996). In *Butte Mining*, the fraud was "committed by foreign individuals on a foreign corporation in a foreign country." 76 F.3d at 290. The plaintiffs' claim for jurisdiction rested on a land transaction in the United States that predated the alleged securities fraud. That is a far cry from *Grunenthal* or the facts of this case.

nom.., Seahorse Coastal Assistance & Towing v. Fleischmann, 119 S. Ct. 444 (1998).

We note, finally, that there may be no stronger proof of the existence of an important conflict among the Circuits than the fact that the respondents took almost 20 pages of their Brief in Opposition to provide a strained and tortuous explanation of why there is no conflict. And it is, of course, true in any case in which a legal standard is applied to facts of record that a court's decision is "fact-specific." See Br. in Opp. 14. If a court's appraisal of particular facts under a disputed legal standard were a bar to review of the standard in this Court, there would never be any opportunity for this Court to consider the legal standards applicable to the many aspects of litigation in the federal courts.

For the above reasons and those stated in our petition, a writ of certiorari should be granted on both issues raised by the petition.

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-7900

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A.
Plaintiff-Appellant,

v.

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

ISSUE PRESENTED AND SUMMARY OF THE POSITION OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission submits this brief as *amicus curiae* in response to the Court's request that the Commission discuss "the jurisdictional issues" in this appeal. The district court dismissed, for lack of subject-matter jurisdiction, the plaintiff's claims seeking recovery under the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, and under the registration provisions of the Securities Act and the Investment Company act of 1940.

The plaintiff, a foreign corporation, alleges that it was induced to purchase securities by misrepresentations made by a stockbroker in London in telephone conversations with the plaintiff's sole shareholder while the shareholder was temporarily living in Florida. Although, as a result of these misrepresentations sent into the United States, the plaintiff's sole shareholder made six separate purchases over a period of six weeks while in Florida, the district court, in light of the foreign aspects of the transactions, dismissed the complaint for lack of subject-matter jurisdiction.[1]

The Commission believes that the antifraud provisions of the securities laws are applicable when, as alleged here, misrepresentations are transmitted into the United States, directed to a person in the this country to induce him to buy securities. This is particularly so when the person is living here for a significant period of time (in this case, at least six weeks and apparently for a substantial part of the year).

With respect to the registration provisions of the Securities Act, the applicability of those provisions in the international context is governed by commission rules contained in Regulation S. Under those rules, absent an exemption from registration, the Securities Act registration provisions are applicable when, as alleged in this case, solicitations to purchase securities are made to a person in this country by telephone from abroad. The principles of Regulation S should generally also be applied by analogy to the coverage of the Investment Company Act.

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[1] The district court also dismissed the complaint for lack of personal jurisdiction over some of the defendants and on considerations of forum non conveniens. The Commission's brief addresses only the issue of subject-matter jurisdiction as to which the Court requested the Commission's views and the Commission possesses special expertise.

Although this is a private action, the principles adopted by the Court in deciding subject-matter jurisdiction in this case may be applicable also in comparable law enforcement actions brought by the Commission. Accordingly, the Commission's own law enforcement interests are implicated here.

STATEMENT OF THE CASE

The plaintiff, Europe and Overseas Commodity Traders, S.A. ("EOCT"), purchased shares in a foreign investment company, Paribas Global Bond Futures Fund (the "Fund") (A. 13 ¶¶29-30; A. 68 ¶¶7-8).[2] The shares were not registered under the Securities Act, and the Fund was not registered under the Investment Company Act, nor, since it was a foreign company, could it have registered under that Act.[3] EOCT, the plaintiff, is a privately held investment firm incorporated in Panama with offices in Monaco. Alan Carr, a Canadian citizen, is EOCT's sole shareholder (A. 7 ¶¶2-3; A. 62). The district court found that Carr was residing in the United States during the period in question. *See Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 940 F. Supp. 528, 531 (S.D.N.Y. 1996).

In an affidavit Carr states that he resides in Florida for a substantial part, though less than half, of each year (A. 173 ¶2; *see also* A. 173, 174-77 ¶2, ¶¶6-16; 293 ¶4; 295 ¶8). The record does not show where he resides the rest of the year, although Carr states that he spends only up to one month of the year in England (A. 173 ¶2; A. 175 ¶8) The

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[2] "A. __¶__" refers to the page and numbered paragraph, if any, in the Joint Appendix. "Br. __" refers to the defendants-appellees' brief.

[3] *See* Sections 7(d) and 8(a) of the Investment Company Act, 15 U.S.C. 80a-7(d) and 80a-8(a).

purchases were made through a brokerage account opened by EOCT a year earlier, in October 1992, at the London Office of Banque Paribas, a French bank, referred to in EOCT's complaint as "Banque Paribas London" (A. 9 ¶10; A. 34 ¶1; A. 67 ¶5).

The Fund, the securities of which the plaintiff purchased, is incorporated and headquartered in Luxembourg (A. 72 ¶1), and is managed by Paribas Asset Management Ltd., a Bahamian corporation that is alleged to be controlled and owned by Banque Paribas (A. 8 ¶6; A. 72 ¶2). The Fund invests in a diversified portfolio of fixed income and currency derivatives (A. 72 ¶2). Its shares are traded exclusively on the Luxembourg Stock Exchange (A. 73 ¶3), and an affidavit filed by an officer of Paribas Asset Management states that he knows of no investors in the Fund who are U.S. citizens or residents (A 73 ¶4; A 76 ¶3).

Carr, on behalf of EOCT, made seven purchases of shares in the Fund totalling $1,788,805 (A. 10 ¶15). The first purchase, of approximately $284,000, was made in early to mid-October 1993. The parties dispute whether the first purchase was made while Carr was in London or in Florida, but the district court found that this purchase was made while Carr was still in London. 940 F. Supp. at 531. We will accept for the purposes of this brief, without taking a position on this factual dispute, the district court's finding that the first purchase was made in London and the consequent conclusion that the federal securities laws are not applicable to that transaction.[4] It is undisputed that the six subsequent purchases were made between October 14 and November 25, 1993 by Carr from Florida (A. 65, 68 ¶8; A.

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[4] While it is not reflected in the district court's opinion, it appears that five of the ten units comprising the first purchase were actually ordered by Carr from Florida (A. 238f ¶6 and n.3).

177 ¶16; Br. 6-7). These six purchases were made in telephone calls between John Arida, an employee of Banque Paribas in London, and Carr in Florida (A. 68 ¶8). Some telephone calls were initiated by Arida and others by Carr (A. 68 ¶8).

The value of the fund declined in the months that followed EOCT's purchases (A 11-12 ¶¶23-26). EOCT then initiated this action in the United States District Court for the Southern District of New York against Banque Paribas London, Paribas Asset Management, the Fund, and Arida. EOCT's complaint alleges that Arida made misrepresentations to Carr concerning the nature and management of the Fund, for which recovery is sought under Section 12(2) of the Securities Act, 15 U.S.C. 771(2), Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder 17 C.F.R. 240.10b-5 (A. 15-17).[5] The alleged misrepresentations were made by telephone during both the initial and subsequent purchases (A. 176-77 ¶¶14-16; A. 293-94 ¶4).

In addition, with respect to all of these transactions, EOCT's complaint alleges the sale of unregistered securities, seeking relief under Section 12(1) of the Securities Act, 15 U.S.C. 771(1),[6] and the sale of shares in an unregistered foreign investment company in violation of Section 7 of the

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[5] Specifically, EOCT alleges that Arida misrepresented that (a) the Fund was overseen by Banque Paribas' proprietary trading desk; (b) the investors' capital was traded along with Banque Paribas' own capital; and (c) the Fund traded securities based primarily on technical as opposed to fundamental considerations (A. 15).

[6] Since the time of the transactions involved in this case, the Securities Act has been amended so that Sections 12(1) and 12(2) are now designated as 12(a)(1) and 12(a)(2). In this brief the Commission will use the old designations in place at the time of the transactions.

Investment Company Act, 15 U.S.C. 80a-7 (A. 13-14). EOCT also makes various state law claims (A. 18-28).

The district court concluded that it lacked subject-matter jurisdiction over EOCT's fraud claims because it found that the fraud was based in London and any misrepresentations made at the time of the six Florida purchases were "merely a continuation" of or were "ancillary" to those made during the initial purchase in London. 940 F. Supp. at 535. The district court did not address subject-matter jurisdiction over EOCT's registration claims, although it dismissed all of the plaintiff's claims.

The district court also ruled that it lacked personal jurisdiction over some of the parties and that the case should be tried in Great Britain based on considerations of forum non conveniens, including an English forum selection and choice of law provision in the customer agreement between EOCT and Banque Paribas.[7]

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[7] *See supra* p. 2 n. 1. In addressing the issue of forum non conveniens the parties and the district court have considered what weight, if any, to give to the choice of forum and choice of law clauses in the customer agreement between EOCT and Banque Paribas. These clauses selected English courts and English law. Based on these clauses, the district court concluded that "English law must govern this case in an English forum." Although this conclusion may be consistent with Second Circuit case law (*see Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993)), the Commission's view, as recently expressed in the *Lloyd's* cases in the courts of appeals for the Fifth and Ninth Circuits, and in a district court in the Fourth Circuit, is contrary to the position of this Court. The Commission's position is that the antiwaiver provisions of the Securities Act and the Securities Exchange Act preclude a United States court from enforcing choice of forum and choice of law clauses that operate in tandem to prevent the plaintiff from pursuing a claim under those Acts in any forum. A panel of the Ninth Circuit agreed (2 to 1) with the Commission's position, but that court will rehear the case *en banc*. *See Richards v. Lloyd's of London*, 107 F.3d 1422 (9th Cir.), *reh'g en banc granted*, 121 F.3d 565 (9th Cir. 1997) (oral argument is scheduled for October 23,

ARGUMENT

THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION OVER THE PLAINTIFF'S SECURITIES FRAUD AND REGISTRATION CLAIMS.

A. The Antifraud Provisions Of The Securities Laws Are Applicable When, As Alleged Here, Misrepresentations From Abroad Are Directed To A Person In The United States To Induce Him To Buy Securities.

When considering whether Congress intended the subject-matter jurisdiction of the district court to extend to transnational securities frauds, courts focus on whether the party asserting jurisdiction has met the requirements of either the "effects test" or the "conduct test."

1. Effects In The United States

The courts have held that under the effects test, which requires a substantial impact in the United States, federal courts have jurisdiction where fraud, although occurring abroad, has an impact on stock traded in a United States market. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 124 (2d Cir. 1995) (*citing Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir.), *modified with respect to the issue of liability of one set of defendants*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969)), *cert denied*, 116 S. Ct. 702 (1996). The district court in this case determined that there was no jurisdiction under the effects analysis

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1997). A panel of the Fifth Circuit rejected the Commission's position. *See Haynsworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997). The district court in the Fourth Circuit agreed with the Commission, but was reversed by the Fourth Circuit (in an appeal in which the Commission did not participate). *See Allen v. Lloyd's of London*, 1996 WL 490177 (E.D. Va. Aug. 23, 1996), *rev'd*, 94 F.3d 923 (4th Cir. 1996).

because the Fund's shares are not traded in a United States market and there was no other substantial impact in the United States. Although it is arguable that the effects test is nonetheless satisfied by the substantial effects of the alleged misrepresentations on Carr in the United States, we submit that, regardless of whether the effects test is satisfied, jurisdiction exists in any event under the conduct test.[8]

2. Conduct in the United States

Under the conduct test, a federal court has subject-matter jurisdiction if (1) the defendant's activities in the United States were more than "merely preparatory" to the securities fraud and (2) these activities or culpable failures to act within the United States "directly caused" the claimed losses. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d at 122 (citations omitted).

While it is sometimes stated that the purpose of the conduct test is to protect foreigners residing outside the United States if acts or culpable omissions occur within the United States, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975), the conduct test is also used to protect persons in the United States from fraudulent representations that are transmitted into this country from abroad, *see, e.g., Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 415 (8th Cir. 1979); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 526-27 (8th Cir. 1973); *Doll v. James Martin Associates Ltd.*, 600 F. Supp. 510, 519 (E.D. Mich. 1984); *SEC v. Capital Growth Co. S.A.L.*, 391 F. Supp. 593, 597 (S.D.N.Y. 1974).

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[8] This conclusion does not necessarily mean that the plaintiff is entitled to litigate its claims in the United States. To be able to do so it would also have to establish personal jurisdiction over the defendants and prevail on the forum non conveniens issue.

The primary focus of the conduct analysis is the location of the fraudulent conduct that caused the victim's loss. "Several courts have found [in securities fraud cases] that making phone calls or sending mail to the United States should be deemed conduct within the United States for jurisdictional purposes in transnational cases." *Tamari v. Bache & Co.*, 547 F. Supp. 309, 315 (N.D. Ill. 1982) (a commodities case), *aff'd*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984).[9] Here, the defendants allegedly made misrepresentations during phone calls between Arida in

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[9] *See also Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d at 421 n.18 (for the purposes of subject matter jurisdiction under the federal securities laws, "[b]oth the place of sending and the place of receipt constitute locations in which conduct takes place when the mails or instrumentalities of interstate commerce are used ***."); *Travis v. Anthes Imperial Ltd.*, 473 F.2d at 524 n.16 (same); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326; 1335 (2d Cir. 1972) (telephone calls and sending mail may be deemed conduct within the United States for subject-matter jurisdiction purposes in federal securities cases); *Doll v. James Martin Associates*, 600 F. Supp. at 520 (in securities cases "the transmission of the letter to Ann Arbor [from Bermuda] was in and of itself a sufficient act to create subject matter jurisdiction***."); *Venture Fund (International) N.V. v. Willkie Farr & Gallagher*, 418 F. Supp. 550, 554 n.8 (S.D.N.Y. 1976) ("For purposes of determining whether subject-matter jurisdiction exists in a securities fraud action, telephone calls to the United States may be relevant domestic activities."); *SEC v. Capital Growth Co.*, 391 F. Supp. at 597 (making telephone calls and sending mail to the United States may be deemed conduct within the United States for purposes of subject matter jurisdiction under the federal securities laws). "Presumably everybody would agree that the making of an offer from another country into the United States by mail or telephone is subject to [Sections] 5 and 17(a) [of the Securities Act] even though neither the seller nor an agent of the seller sets foot in the United States" for purposes of both the conduct and effects analysis. American Law Institute, Federal Securities Code §1905 comment 3(b) (1980). *See also* Federal Securities Code §1905 comment 1(b)(ii) (discussion of *Leasco*).

London and Carr in Florida.[10] EOCT has alleged that defendants made the fraudulent representations in the United States in order to induce it to make six purchases of Fund shares. And these misrepresentations are the alleged direct cause of plaintiff's losses.

The district court nonetheless decided that it did not have subject-matter jurisdiction over EOCT's fraud claims under the conduct analysis because it found that the fraud complained of was not based in the United States. It reasoned that "this Court is guided by the principle that direct causation depends 'not only on how much was done in the United States but also on how much***was done abroad.'" 940 F. Supp at 535 (*quoting IIT v. Cornfeld*, 619 F.2d 909, 920-21 (2d Cir. 1980) (footnote omitted in original)). The district court went on to state that the defendants' activities in the United States "are outweighed by the acts that were done abroad – the establishment of the account, the initial purchase order, and the actual purchases with the funds in the account – which essentially constitute the core of the transaction." The communications between Arida and Carr while Carr was in Florida were, according to the trial court, "only ancillary to the initial fraud in London and therefore can not be said to have directly caused plaintiff's loss." *Id.*

We believe that the district court erred in two respects in failing properly to focus on the precise violative conduct alleged here. First, the court failed to view each of the purchases of Fund shares as a separate fraudulent trans-

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[10] Defendants suggest (Br. 21-22) that the court in *Koal Industries Corp. v. Asland, S.A.*, 808 F. Supp. 1143, 1155 (S.D.N.Y. 1992) held that a telephone call to the United States does not constitute conduct in this country. There was no indication in *Koal*, however, that misrepresentations were made during the telephone call, which is perhaps why the court characterized the call as "a preparatory act."

action. The plaintiff made six separate purchases of Fund shares while Carr was in the United States, and it alleged that misrepresentations were made in the United States to induce these purchases (A. 176-77 ¶¶14-16). The fact that there was an earlier purchase in London is irrelevant to whether there is subject-matter jurisdiction with respect to the subsequent six transactions.

Second, the district court failed to focus on the conduct that constitutes the violations, that is, the defendants' alleged misrepresentations. In this respect, the court's analysis is contrary to the type of analysis used in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d at 987, where this Court held that United States jurisdiction should extend only to cases where the *fraudulent* acts occur in the United States and not to those cases where mere *preparatory* acts occur here. In the present case, the conduct that is alleged to have occurred in the United States consists of the fraudulent acts that induced Carr to purchase additional Fund shares. Far from being preparatory or ancillary, as the district court concluded, this is the precise fraudulent conduct that plaintiff alleges to be the direct cause of its losses. The district court not only failed to follow the clear guidance of *Bersch*, but stood *Bersch* on its head by reviewing preparatory or ancillary conduct abroad, including opening an account in London and internal communications made to process the purchases, as more significant than the misrepresentations themselves. 940 F. Supp. at 535.

Both the district court and the defendants consider it significant that plaintiff EOCT, a foreign corporation, was not present in United States. The defendants in *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d at 1337-38, made the same argument where the plaintiff purchaser was a wholly-owned foreign subsidiary of an American company and the alleged misrepresentations were made to the parent company in the United States. This Court found

that distinction irrelevant because, as in this case, the defendants were aware of the ownership of one entity by the other, and both sides accepted the foreign entity as the alter ego of its owner. *Id.* In subsequently referring to *Leasco*, this Court stated: "We have previously refused to be deterred from considering the real facts by the interposition of a foreign subsidiary of this kind." *ITT v. Cornfeld*, 619 F.2d at 920. *See also Itoba Ltd. v. Lep Group PLC*, 54 F.3d at 124 (although the plaintiff, the wholly owned foreign subsidiary of an American company, was the nominal purchaser of the foreign security in question, this distinction did not matter because it was the American parent that ultimately bore the loss).

3. Carr's Temporary Presence in the United States

Since the violative conduct alleged in this case -- mis-representations that were phoned to the United States -- constitutes conduct in this country, we submit that there is subject-matter jurisdiction under the conduct test. And, in fact, we have found no appellate case where the court failed to find jurisdiction when, as here, the misrepresentations that caused the plaintiff's losses were transmitted into the United States by telephone or otherwise.[11] But none of the cases

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[11] In one case where misrepresentations were allegedly made in the United States, *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170, 175-76 (5th Cir. 1990), the court refused to find subject-matter jurisdiction on a ground resembling estoppel. The court stated:

> [Plaintiffs] sought, through extensive machinations, to avoid the application of the federal securities laws and their attendant obligations in order to facilitate their investment in a foreign offering from which they were disqualified, doing so without the knowledge of the defendants. *** Having gone to such lengths to structure a transaction not burdened by the securities laws, plaintiffs cannot expect to wrap themselves in their protective mantle when the deal sours (footnote omitted.)

upholding jurisdiction in that context (*see supra* p. 9) involved representations made to foreigners who were in the United States only temporarily. The Commission does not believe, however, that the fact that Carr was living here only temporarily is significant under the conduct analysis.

The courts recognize that "[a] finding of jurisdiction will depend upon the analysis of the particular facts in any given case." *Continental Grain v. Pacific Oilseeds*, 592 F.2d at 414. Where, as here, the basic formulation of the conduct test is satisfied by acts occurring here, courts often consider additional factors either to bolster jurisdiction or to ensure that the assertion of jurisdiction is reasonable. *See generally Restatement (Third) of the Foreign Relations Law of the United States* §416 reporters' note 2 (1987). Factors discussed by the courts include the involvement of securities of American companies or securities traded in an American market, *see, e.g., CL-Alexanders Laing & Cruickshank v. Goldfeld*, 709 F. Supp. 472, 478 (S.D.N.Y. 1989); the involvement of Americans in committing the fraud, *see, e.g., IIT v. Cornfeld*, 619 F.2d at 918; the consummation of the transaction in the United States, *see, e.g., Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.), *cert. denied*, 502 U.S. 1005 (1991); and the ties to the United States of the person seeking the protection of the securities laws, *see, e.g., Travis v. Anthes Imperial Ltd.*, 473 F.2d at 528.

In looking to these factors, courts have applied the federal securities laws in a very broad fashion where violative conduct occurs in the United States, even if the victim's ties to this country are insubstantial.[12] Foreign

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[12] The *Restatement (Third) of the Foreign Relations Law of the United States* notes that the conduct test is by far the most common basis for the exercise of jurisdiction and is generally free from controversy. §402 comment c. And subsection 1905(a)(1)(D) of the American Law Institute, Federal Securities Code would have made the provisions of the

plaintiffs, for example, have successfully asserted jurisdiction based primarily on misrepresentations made to them by foreign defendants while the parties were in the United States temporarily.[13] The only appellate cases we have identified where conduct in the United States was held insufficient to sustain jurisdiction are cases, unlike here, where the conduct in this country was merely preparatory or where the parts of a multinational fraud that occurred in the United States were minimal compared to the culpable conduct committed elsewhere.[14]

This Court nonetheless has indicated in dictum that the antifraud provisions would not be applicable where misrepresentations are made to a foreign plaintiff while visiting the United States. In *Leasco Data Processing Equipment v. Maxwell*, 468 F.2d at 1338, this Court described a hypothetical situation where a German businessman and a Japanese businessman meet in New York for convenience, and the latter fraudulently induces the former to make purchases of Japanese securities on the Tokyo Stock Exchange. Under these hypothetical facts, this Court suggested, the application of United States law might not be reasonable because the parties were here "only transitorily," such that "neither party acted with the

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Code applicable when there is "prohibited, required or actionable conduct whose constituent elements occur to a substantial (but not necessarily predominant) extent in the United States."

[13] *See, e.g., AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d 148, 153 (2d Cir. 1984); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 426 (9th Cir. 1983).

[14] *See, e.g., North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1053 (2d Cir. 1996); *Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 6-8 (2d Cir. 1979); *IIT v. Vencap, Ltd*, 519 F.2d 1001, 1018 (2d Cir. 1975).

expectation" that United States law would apply. *See Restatement (Third) of the Foreign Relations Law of the United States* §416 reporters' note 2.

This dictum in *Leasco* has not been reflected in the holdings of subsequent decisions by this Court and other courts of appeals. Although this Court in *AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d at 153, wrote that *Leasco* strongly implied that the *Leasco* hypothetical facts would not support jurisdiction, the *AVC Nederland* Court nevertheless found the federal securities laws applicable where misrepresentations were made to the plaintiff, a Dutch businessman, by other Dutch businessmen during a business trip by the plaintiff to the United States.[15] And in what appears to be the only other case involving misrepresentations made to a foreign plaintiff while visiting the United States, *Grunenthal GmbH v. Holtz*, 712 F.2d at 425, the Ninth Circuit expressly rejected the notion that the plaintiff's temporary status in the United States should preclude jurisdiction under the conduct analysis.

We believe that the antifraud provisions of the securities laws should be applicable when, as alleged in this case, misrepresentations are directed to a person in the United States to induce him to buy securities.[16] This is particularly so here, since Carr lived in the United States for a significant period of time, and apparently did so each year (A. 173 ¶2; 176-77 ¶¶14-16; A. 293-94 ¶4).

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[15] Aside from the location of the misrepresentations, the only other basis for jurisdiction in *AVC Nederland* was that the securities were "nominally American" even though "really Dutch." 740 F.2d at 154.

[16] The only exception might be the situation where a person receives misrepresentations from abroad while in the United States briefly in transit between two other countries, since he might have no reasonable expectation of being protected by our antifraud provisions. That question, however, need not be resolved in this case.

There is no question, of course, that *Americans* expect the laws of this country to protect them while they are in this country, and there is no reason why *foreigners* present in the United States should not likewise reasonably expect and receive such protection. To deny the protection of the antifraud provisions to foreign nationals temporarily in this country would create potential fraud victims who expect that they are protected by our laws when, in fact, they are not. And the policy of our securities laws should be to protect persons within the territory of the United States. In addition, a territorial approach avoids uncertainty by providing a relatively clear line between covered and uncovered conduct.

Moreover, concerns of reciprocity call for applicability of the antifraud provisions in this case. In order to encourage other nations to extend the protection of their laws to Americans located abroad, we should extend to foreign nationals temporarily in this country the same antifraud protection we afford permanent residents of the United States. *Cf. SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

B. The Registration Provisions Of The Securities Act And Of The Investment Company Act Cover Transactions Where, As Alleged Here, Solicitations To Purchase Securities Are Made To A Person In This Country by Telephone From Abroad.

In contrast to the antifraud provisions, the coverage of which is governed by principles developed in the decisional law, the coverage of the Securities Act's registration provisions in the transnational context is governed by Commission rules – Regulation S (reproduced in the Statutory Addendum). Under these rules, as explained below, the transactions in this case are covered by the

registration provisions of the Securities Act. Accordingly, absent an applicable exemption from registration, the Fund securities sold to EOCT were required to be registered.[17]

In addition, although Regulation S deals only with registration, the fact that under Regulation S these transactions are covered by the registration provisions lends support to our earlier conclusion that the transactions are subject to the antifraud provisions. It is well established that the reach of the antifraud provisions is at least as great as that of the registration provisions. *See Consolidated Gold Fields plc v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir.), *cert. denied*, 492 U.S. 939 (1989); *IIT v. Cornfeld*, 619 F.2d at 921; *Bersch v. Drexel Firestone, Inc.*, 519 F.2d at 986; *Plessey Company plc v. General Electric Co. plc*, 628 F. Supp. 477, 494 (D. Del. 1986); *See also Restatement (Third) of the Foreign Relations Law of the United States* §416 comment a.

In 1990, the Commission adopted Regulation S, Rules 901-904, which takes a territorial, or conduct-based, approach to the registration requirements of Section 5 of the

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[17] The Commission takes no position as to whether the defendants are eligible for an exemption from registration, such as the exemption under Section 4(2) of the Securities Act for private offerings. Whether an exemption is available is not an issue in this appeal.

Preliminary note 8 to Regulation S (17 C.F.R. preceding 230.901) provides that Regulation S does not apply to transactions in certain investment company securities. The purpose of that provision was not to *narrow* the coverage of the Securities Act registration provisions but rather, in the case of investment company securities, to *broaden* their coverage. The purpose was to allow the Commission to require registration, in the case of investment company securities, in situations where Regulation S would otherwise exclude transactions from coverage. *See* Offshore Offers and Sales (Release adopting Regulation S), Securities Act Release 6863 (April 24, 1990), 55 Fed. Reg. 18306, 18321, n.152, 1990 WL 311658 at *42, n.152 ("Release 6863").

Securities Act, 15 U.S.C. 77e. Regulation S provides, in general, that Section 5 applies to "offers and sales that occur within the United States" and does not apply to "offers and sales that occur outside the United States." Rule 901, 17 C.F.R. 230.901. Of particular significance here, the Commission has emphasized that an offer "would not be deemed to be outside the United States if made to a person inside the United States" "by a telephone call soliciting a purchase in the United States or written material offering a security being mailed or delivered to a person in the United States." Offshore Offers and Sales (Release proposing Regulation S), Securities Act Release 6779 (June 10, 1988), 53 Fed. Reg. 22661, 22666, 1988 WL 239804 at *12.

There are two nonexclusive safe harbors under Regulation S. In order to qualify for either safe harbor the transaction in question must be an "offshore transaction." Carr's purchase of Fund shares on behalf of EOCT does not qualify as an "offshore transaction" because such a transaction is defined as an offer to sell securities that "is not made to a person in the United States." Rule 902(i)(i), 17 C.F.R. 230.902(i)(i).[18] An offer made to a person in the United States includes offers made to "transient visitors" not resident in the United States. *See* Release 6863, n.115, 55

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[18] The fact that Carr made these purchases on behalf of a foreign entity, not present in the United States, is irrelevant under Regulation S. The regulation provides only one exception that allows an offer or sale made to a person in the United States to nevertheless qualify as an "offshore transaction." That exception applies only to an offer and sale to a "dealer or other professional fiduciary" who holds discretionary accounts for the benefit non-U.S. persons and to an offer and sale made to certain multinational organizations. *See* Rules 902(i)(3) and (o)(2), 17 C.F.R. 230.902(i)(3) and (o)(2). The exception for U.S. professional fiduciaries was adopted in light of the serious competitive disadvantages they might face without such an exception. *See* Release 6863, 55 Fed. Reg. 18306, 18317, 1990 WL 311658 at *19.

Fed. Reg. at 18316 n.115, 1990 SEC LEXIS 740 at *62, n.115.[19]

In light of this territorial approach, the defendants in this case were required either to comply with the registration requirements of the securities Act (absent an exemption from registration) or not offer the securities to Carr in the United States.[20]

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[19] The Commission has not defined the term. "Transient visitor" as used in Release 6863 does not necessarily refer to foreigners who are in the United States merely because they are in transit between two other countries. *See supra* at 18, n.16.

[20] The Commission similarly requires broker-dealer registration under Section 15(a) of the Exchange Act, 15 U.S.C. 78(o)(a), by foreign broker-dealers who deal with persons in this country from abroad. *See* Registration Requirements for Foreign Broker-Dealers (Release adopting Rule 15a-6), Exchange Act Release 27017 (July 11, 1989), 54 Fed. Reg. 30013, 30017, 1989 WL 258954 at *8. The Commission does not, however, require registration of a foreign broker-dealer dealing from abroad with a foreign person temporarily in the United States where the foreign broker-dealer had a bonafide preexisting relationship with the person before he entered this country. *See* Rule 15a-6(a)(4)(iii), 17 C.F.R. 240.15a-6(a)(4)(iii). This exception reflects the need for foreign persons to continue to contact their brokers while visiting the United States. It appears that Banque Paribas may not, therefore, have been required to register as a broker-dealer before offering securities to Carr in Florida. However, a foreign broker-dealer who deals with a foreign person temporarily in this country must still "be careful that any offers or sales of securities made within the United States comply with the registration provisions of the Securities Act." Registration Requirements for Foreign Broker-Dealers (Release proposing Rule 15a-6), Exchange Act Release 25801 at n.46 (June 14, 1988), 53 Fed. Reg. 23645, 23649, n.46, 1988 WL 239776 at *9, n.46. *See also* Release 27017, 54 Fed. Reg. at 30030, 1989 WL 258954 at *35 (noting that the interpretive statements in Release 25801 are being codified in Rule 15a-6(a)(4)(iii)). In addition, the Commission noted, a foreign broker-dealer's securities activities would be subject to the antifraud provisions of the federal securities laws regardless of whether it was required to register as a broker-dealer. Release 27017, 54 Fed. Reg. at 30021, n.94, 1990 WL 258954 at *15, n.94.

The policy considerations that underlie Regulation S's territorial approach to the registration provisions of the Securities Act are much the same as those that favor the application of the antifraud provisions to protect foreign persons in the United States regardless of whether they are here permanently or temporarily. In adopting Regulation S, the Commission avoided uncertainty by drawing a clear line between those transactions that are subject to the registration provisions and those that are not. Moreover, as the adopting release for Regulation S indicates, that line is best drawn at the territorial borders of the United States because those who are offered securities while they are in the United States may tend to purchase those securities with the expectation that they are offered in compliance with the protections afforded under United States law. *See* Release 6863, 55 Fed. Reg. at 18308, 1990 WL 311658 at *5.

As previously noted, by its terms Regulation S is applicable only to the registration provisions of the Securities Act. Nevertheless, we believe that the principles of Regulation S should generally be applied by analogy to determine the applicability of the Investment Company Act to transnational transactions, such as EOCT's purchase of Fund shares here. Indeed, the Commission's staff has used Regulation S as a guide to decide when the Investment

Company Act is applicable to transactions by an unregistered foreign investment company.[21]

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[21] Section 7(d) of the Investment Company Act prohibits foreign investment companies from offering their securities publicly in the United States, unless the foreign investment company obtains an order from the Commission permitting the company to register under the Investment Company Act. Section 7(d), however, does not prohibit private offerings by foreign investment companies. The staff has interpreted Section 7(d) in light of certain provisions in Sections 3(c)(1) and 3(c)(7) of the Act, 15 U.S.C. 80a-3(c)(1) and 3(c)(7) – the so-called "private offering exceptions" from the definition of an investment company. Based on those exceptions, the staff has interpreted Section 7(d) as not permitting an unregistered foreign investment company to make a private offering in the United States unless either: (1) the company has no more than 100 U.S. shareholders; or (2) all of the company's U.S. shareholders are "qualified purchasers." This interpretation has the effect of treating unregistered foreign funds comparably to unregistered domestic funds. *See* Touche Remnant & Co. (no action letter, pub. avail. Aug. 27, 1984) 1984 WL 45636; Investment Funds Institute of Canada (no action letter, pub. avail. Mar. 4, 1996), 1996 WL 102167 at *7-8 ("IFIC"); and Goodwin, Procter & Hoar (no action letter, pub. avail. Feb. 28, 1997), 1997 WL 86002 at *7 ("Goodwin, Procter").

The staff has looked to the definition of "U.S. person" in Regulation S (Rule 902(o), 17 C.F.R. 230.902(o)) to determine when a shareholder is a U.S. shareholder and therefore will either be counted toward the 100-person limitation or required to be a qualified purchaser. The staff, for example, looks to Rule 902(o)(1)(i), 17 C.F.R. 230.902(o)(1)(i), in deciding that a natural person's residency, rather than citizenship, determines his or her status for this purpose. Thus, a foreign citizen living in this country must either be counted toward the 100-person limit or be a qualified purchaser, while a U.S. citizen residing abroad would not. *See* Goodwin, Procter, 1997 WL 86002 at *9. The staff also relies on the exception to the definition of U.S. person provided by Rule 902(o)(2), 17 C.F.R. 230.902(o)(2), for professional fiduciaries who are resident in this country. *Id.* 1997 WL at 86002 at *13. The staff has also excluded from the 100-person limitation purchases by U.S. residents in an offshore secondary market. *See* IFIC, 1996 WL 102167 at *11, n.13 and Goodwin, Procter, 1997 WL 86002 at *15, n.34 (extending IFIC to Section 3(c)(7) funds). The staff has further stated that it will look to the definition of "directed selling efforts" in

CONCLUSION

For the foregoing reasons, the district court had subject-matter jurisdiction over the plaintiff's securities fraud and registration claims.

Respectfully submitted,

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Rule 902(b) for guidance when a foreign fund is engaging in activities that could reasonably be expected to condition U.S. markets such that an offering should not be deemed private. *See* IFIC, 1996 WL 102167 at *11, n.11. The staff will not, however, look to the safe harbor provision of Rule 903 to exclude from the 100-person limitation a person who resides in this country and who purchases abroad, not in a secondary market, but rather from the issuer, its agents or affiliates. *See* Goodwin, Procter 1997 WL 86002 at *15.